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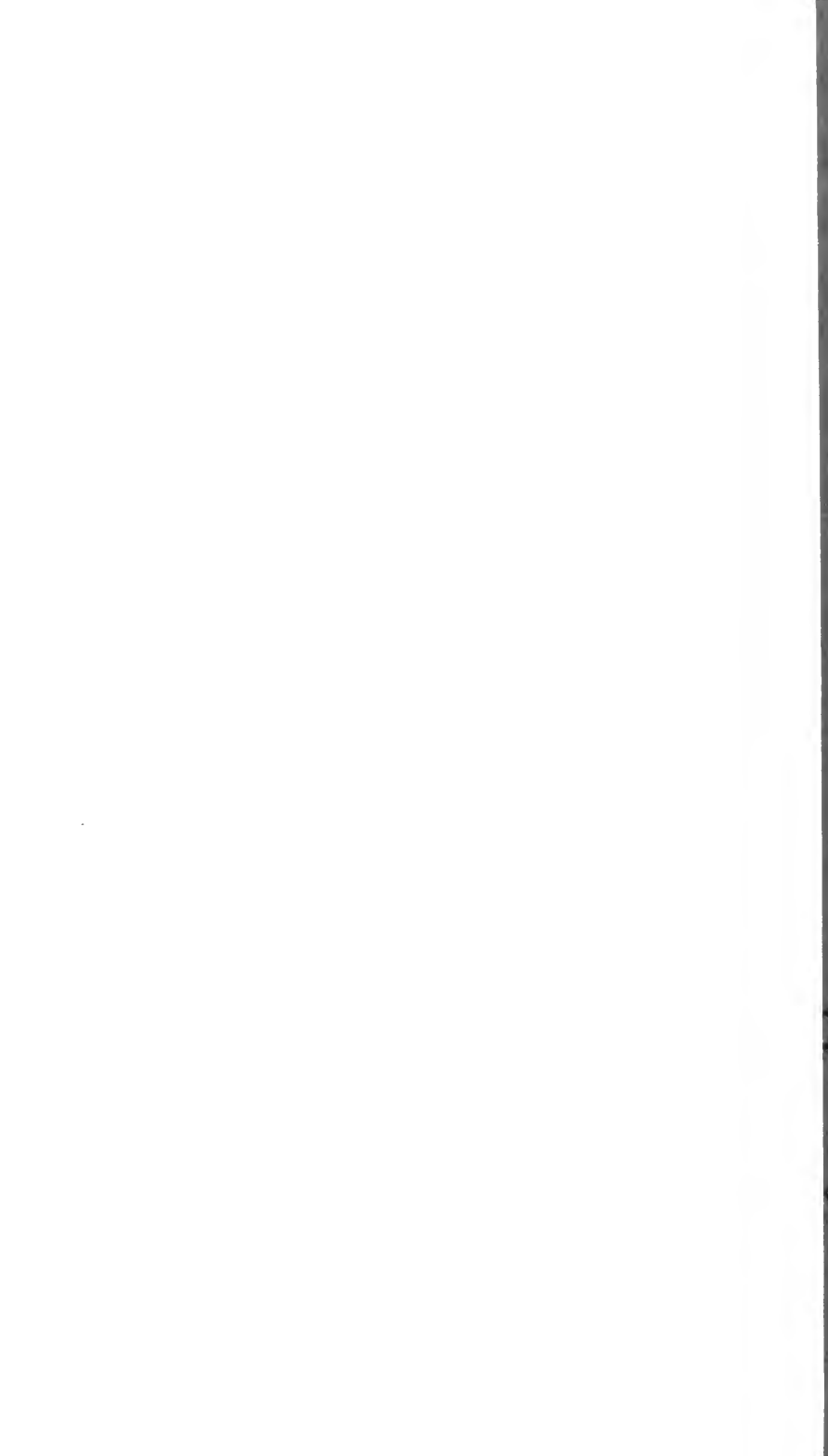
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2958

No. 15005

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

See Vol. 2957

THE FLINTKOTE COMPANY, a Corporation,

Appellant,

vs.

ELMER LYSFJORD and WALTER R. WALDRON, Doing
Business as Aabeta Co.,

Appellees.

OPENING BRIEF FOR APPELLANT.

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No. 15005

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

THE FLINTKOTE COMPANY, a Corporation,

Appellant,

vs.

ELMER LYSFJORD and WALTER R. WALDRON, Doing
Business as Aabeta Co.,

Appellees.

OPENING BRIEF FOR APPELLANT.

JURISDICTIONAL STATEMENT.

This is an action for treble damages for violation of the antitrust laws of the United States (R. 4, 17-18). Original jurisdiction of such controversies is vested in the district courts by 15 U.S.C.A. §15 and 28 U.S.C.A. §1337. It was commenced under Section 4 of the Act of October 15, 1914 (38 Stat. 731; 15 U.S.C.A. §15) for an alleged violation of Section 1 of the Sherman Act (Act of July 2, 1890, c. 647, Sec. 1; 26 Stat. 209; as amended, 15 U.S.C.A. §1) (R. 4, 17-18).

The District Court of the United States, Southern District of California, was the proper district court to entertain this action, since The Flintkote Company is qualified to and does transact business in that district (15

U.S.C.A. §15) (R. 41). (Plaintiffs apparently abandoned the claims stated in the First Amended Complaint for injunctive relief under 15 U.S.C.A. §26 and those based upon monopoly prohibited by 15 U.S.C.A. §2.)

The United States Court of Appeals for the Ninth Circuit has jurisdiction of this appeal pursuant to 28 U.S.C.A. §§1291, 1294(1). No direct review by the Supreme Court may be had in this case.

STATEMENT OF THE CASE.

For convenience and for the purpose of more readily identifying the parties, we shall throughout this brief refer to appellant, The Flintkote Company, defendant below, as "defendant," or "Flintkote," and to appellees Elmer Lysfjord and Walter R. Waldron, plaintiffs below, as "plaintiffs."

Plaintiffs are acoustical tile contractors doing business in the City of Los Angeles under the firm name and style of "aabeta co." They established their present business in December of 1951 or January of 1952. Prior to that time plaintiffs were employed as salesmen by R. W. Downer Company, an acoustical contracting company, in Los Angeles. For many years before their employment by the Downer company, plaintiffs had been employed by other acoustical contractors in the Los Angeles area as applicators or salesmen. Prior to the establishment of aabeta co., neither plaintiff had had an acoustical contracting business of his own, and neither plaintiff had managed or been engaged in the management of an acoustical contracting business.

Flintkote is engaged in the business, among others, of manufacturing building materials, including acoustical tile. Flintkote's acoustical tile is manufactured in the territory

of Hawaii from sugar cane fibre. It is shipped from Hawaii to continental United States by water carrier and is transported from the port of entry directly to the purchaser thereof. Flintkote manufactures a variety of shapes, sizes, thicknesses and styles of cane fibre acoustical tile. It does not manufacture any mineral or incombustible tile. Flintkote's acoustical tile is distributed only through approved acoustical contractors; none is sold through lumber yards or building materials dealers. The number of approved Flintkote contractors in various geographical areas is limited. With the exception of the disputed period during which plaintiffs were doing business in Los Angeles under the claim that they were authorized Flintkote contractors for the Los Angeles area, there have never been more than three approved Flintkote acoustical contractors in that area. During the period involved in this case, R. E. Howard Company, the Sound Control Company (to Spring, 1952), Acoustics, Inc. (from June 3, 1952) and Coast Insulating Products were handling Flintkote tile.

During the summer and early fall of 1951, plaintiffs who were then salesmen for R. W. Downer Company, approached Mr. Robert Ragland, who was then employed by Flintkote as a "sales engineer" for acoustical tile, with regard to plaintiffs being approved as Flintkote acoustical contractors if they were to establish their own business. Mr. Ragland arranged a series of meetings between plaintiffs and Mr. Ragland's superiors at Flintkote, and, in the first part of December, 1951, plaintiffs were approved as Flintkote acoustical contractors. There is a dispute between plaintiffs and Flintkote respecting the scope of that approval. Flintkote employees uniformly testified that it was clearly understood that plaintiffs were authorized to

do business in the San Bernardino-Riverside area only and were prohibited from doing business in the Los Angeles area, except in particular cases after obtaining approval in advance. Plaintiffs contend that they were authorized to do business generally in both the Los Angeles and the San Bernardino areas and take the position that to do business in San Bernardino was a condition of their approval as Flintkote contractors in Los Angeles. Plaintiffs submitted an initial order for a carload of acoustical tile. Plaintiffs established places of business in Los Angeles and San Bernardino. The initial carload of acoustical tile was duly delivered to plaintiffs' place of business in San Bernardino, and paid for by a check drawn on a San Bernardino bank.

In early February, 1952, Flintkote's approved acoustical contractors in the Los Angeles area individually complained to Flintkote that plaintiffs were doing business in the Los Angeles area. Representatives of Flintkote called on these Los Angeles contractors and advised them that plaintiffs were supposed to be doing business only in the San Bernardino-Riverside area and that Flintkote had no knowledge or information respecting the activities of plaintiffs in the Los Angeles area. The Los Angeles contractors were advised that Flintkote would investigate plaintiffs' activities and take such steps as Flintkote deemed to be proper under the circumstances.

At or about February 10, 1952, Mr. Frank S. Harkins, then the manager of Flintkote's Building Materials Division, sent Mr. Ragland out to investigate the activities of plaintiffs. The results of that investigation are embodied in Mr. Ragland's report to Mr. Harkins dated February 14, 1952 (Deft. Ex. "I"). That report stated among other things that plaintiffs had a small warehouse

on Atlantic Avenue in Bell; that they had accepted a contract for an acoustical installation at Torrance and had submitted a bid on a job in Los Angeles. The evidence is in dispute with respect to Mr. Ragland's knowledge of the existence of plaintiffs' place of business in the Los Angeles area. Ragland stated he did not know about this office until he made the investigation on which his report was based. Plaintiffs testified that Ragland knew all about this office long before, and in fact had been there several times. There is no direct evidence that anyone else in Flintkote's organization had any prior knowledge of any of plaintiffs' activities in the Los Angeles area.

On February 19, 1952, Mr. Harkins sent Mr. E. F. Thompson, Building Materials Sales Manager for Flintkote, to tell plaintiffs that because they were doing business in Los Angeles in violation of the express understanding that they would not do so, they were no longer to be considered approved Flintkote acoustical contractors and would no longer be permitted to purchase acoustical tile from Flintkote. Mr. Thompson, after having Mr. Ragland advise plaintiff Lysfjord by telephone of the impending visit, proceeded to plaintiffs' Los Angeles office, taking with him Mr. Ragland and Mr. Browning Baymiller, Flintkote's Assistant Building Materials Sales Manager. There is some dispute as to what was actually said at the meeting of Messrs. Lysfjord, Waldron, Thompson, Baymiller, and Ragland at plaintiffs' Los Angeles place of business (although it is admitted that Thompson gave as a reason for the cut off the fact that plaintiffs were operating in Los Angeles), but the upshot of the meeting was that plaintiffs could no longer purchase acoustical tile from Flintkote, except that Flintkote agreed

to supply tile in quantity sufficient to fulfill any outstanding commitments of plaintiffs.

Flintkote filled two small additional orders for acoustical tile submitted by plaintiffs pursuant to Flintkote's aforesaid agreement.

Plaintiffs did not make any other arrangement to obtain acoustical tile directly from the manufacturer thereof or to be approved as acoustical contractors by any manufacturer of acoustical tile. Plaintiffs contend that they were unable to make such an arrangement. Flintkote contends that there is no evidence of such inability.

Plaintiffs paid more for such acoustical tile as they purchased from persons other than Flintkote than the Flintkote carload prices for similar acoustical tile prevailing at the time such purchases were made.

This action was commenced on July 21, 1952. The case came on for trial before a jury May 4, 1955.

Plaintiffs introduced evidence tending to prove the existence of a conspiracy in restraint of trade among the acoustical contractors in the Los Angeles area. Flintkote objected to this evidence on the ground that no connection with Flintkote was shown. The evidence consisted of the so-called "take-off sheets" which plaintiffs had obtained during their employment by the R. W. Downer Company (Pltf. Exs. 18 through 28) and certain files and records obtained from the other acoustical contractors (Pltf. Exs. 29 through 35). Plaintiffs also testified to certain conduct of the other contractors which might indicate a conspiracy or agreement among them. It may be inferred that the purpose of the conspiracy among the contractors was to fix prices and allocate jobs among them for public works.

Plaintiffs' theory was that the other contractors wished to protect themselves and their price-fixing and job-allocating arrangement from competition by plaintiffs and, to that end, asked Flintkote to refuse to deal with plaintiffs. Flintkote then, according to plaintiffs' theory, joined with the contractors and, in furtherance of the conspiracy, refused to deal further with plaintiffs. Flintkote contends that no evidence was introduced tending to connect Flintkote with any conspiracy which may have existed among the contractors.

Flintkote's position is that it in good faith approved plaintiffs as Flintkote acoustical contractors in the San Bernardino-Riverside area upon the express condition that plaintiffs do no business in the Los Angeles area. In contravention of that express condition, plaintiffs in fact established a place of business in Los Angeles. Flintkote unilaterally determined that such conduct on the part of plaintiffs made them undesirable customers and Flintkote thereupon refused to deal further with plaintiffs. Flintkote had no knowledge or information respecting the existence of any conspiracy of any kind among the acoustical contractors in Los Angeles and did not join in or consciously act in furtherance of any such conspiracy. The Los Angeles Flintkote contractors complained to Flintkote about plaintiffs because they had been advised by Flintkote that Flintkote tile would be sold to only three contractors in Los Angeles, but Flintkote did not agree with any acoustical contractor to refuse to deal with plaintiffs or to take any other action with respect to them.

Flintkote moved for directed verdict at the close of plaintiffs' case and at the close of all the evidence on the ground that no evidence had been introduced tending to show Flintkote's knowledge of or participation in any con-

spiracy. In connection with those motions Flintkote moved to strike all evidence of acts or conduct of the contractors on the ground that they could not be attributed to and were not binding upon Flintkote, absent a showing that Flintkote and the contractors were co-conspirators. Said motions and Flintkote's timely motion for judgment notwithstanding the verdict were denied.

Plaintiffs were permitted to testify over Flintkote's objections respecting certain declarations allegedly made to plaintiffs by Mr. Ragland. Those declarations were entirely historical in nature. There was no showing that Mr. Ragland was authorized by Flintkote to make the declarations in question or that they were made in the course of his performance of any duties for his employer or were in any way connected with his employment. The declarations related to certain contacts between Flintkote and some of the contractors, including an alleged meeting at which threats of boycotting Flintkote were supposed to have been made. This testimony was detrimental to and contrary to the position taken by Flintkote at the trial. (Mr. Ragland denied making the declarations, and all the persons said to be participants in the alleged contacts denied that such incidents occurred.) Plaintiffs' testimony in this regard was allowed to remain in evidence over repeated motions to strike.

Certain evidence respecting plaintiffs' damages was introduced over Flintkote's objections that the same was speculative, without foundation in fact, palpably erroneous in some instances, and in part relating to a period in

excess of the maximum period for which plaintiffs might be entitled to damages in this action. Flintkote's position was that plaintiffs were entitled to recover damages, if at all, only with respect to injury sustained by reason of the failure of Flintkote to supply tile to plaintiffs prior to July 21, 1952, the date of filing the complaint in the action. Plaintiffs took the position that they were entitled to recover damages resulting from the failure of Flintkote to supply tile to them up to the time of trial, and much of the evidence related to the period proposed by plaintiffs. Flintkote requested jury instructions regarding damages in accordance with its theory. The Court instructed in accordance with plaintiffs' theory.

Flintkote contends that the court's instructions to the jury were erroneous in several particulars which are reviewed in detail in the Specification of Errors and in the argument, *infra*.

The action was originally commenced against all of the allegedly conspiring acoustical contractors, the Acoustical Contractors' Association of Southern California, and Flintkote. Prior to the trial of the action against Flintkote, the defendants other than Flintkote paid the sum of \$20,000 to plaintiffs as consideration for a covenant not to sue and the dismissal of the action as to them. The legal effect of the receipt of the \$20,000 by plaintiffs was withdrawn from the jury and submitted to the Court pursuant to stipulation. Flintkote's position was and is that the \$20,000 reduced the actual damages sustained by plaintiffs by that amount and should be deducted from the total actual damages assessed by the

jury (\$50,000) before trebling the same. Plaintiffs took the position that at most the \$20,000 should be credited against a judgment for treble the actual damages assessed by the jury. The court credited said \$20,000 against the judgment for trebled damages.

The Court fixed the fee of plaintiffs' attorney at \$25,000. Flintkote contends that such sum is unreasonable on the evidence elicited in support thereof (consisting solely of the Petition for Attorney's Fees and Costs and Exhibit A thereto [R. 105-113]). Of course if a new trial is ordered, the allowance of attorney's fees must be vacated.

The jury returned a verdict in favor of plaintiffs and fixed the damages at \$50,000. The Court rendered judgment in the sum of \$155,165.70, consisting of treble the damages found by the jury, \$25,000 attorney's fees, \$165.70 costs, less the \$20,000 received from the parties to the covenant not to sue.

Flintkote made a motion for a new trial on four grounds:

(a) Substantial and prejudicial errors of law were committed in the course of the trial.

(b) The verdict of the jury is not supported by legally sufficient evidence.

(c) The verdict of the jury is against the weight of the evidence.

(d) The damages assessed by the jury are excessive.

The motion was denied. In so doing we respectfully submit the Court abused its discretion. Our position in this connection is set out in the Specification of Errors and the Argument.

SPECIFICATION OF ERRORS.

1. The court erred in denying defendant's motion to set aside the verdict of the jury and to enter judgment in favor of defendant and against plaintiffs in accordance with defendant's motion for directed verdict at the close of all of the evidence upon the ground that plaintiffs had not introduced any substantial evidence tending to show that The Flintkote Company had done any act or acts in violation of the antitrust laws.

2. The court erred in admitting evidence relating to an alleged conspiracy among the acoustical contractors, formerly defendants in this action, to fix prices and allocate jobs for public works in the Los Angeles area, over defendant's objection that no connection of defendant Flintkote with such a conspiracy has been proved and in refusing to strike that testimony on motion of defendant Flintkote on the same ground. The evidence thus erroneously admitted consists of plaintiff's exhibits 18 through 37, all testimony in any way connected with any of those exhibits, and other testimony respecting the activities of the acoustical contractors, otherwise than in connection with or in direct relationship to defendant Flintkote. That testimony is too voluminous to set forth at length, since it covers over a hundred pages of the record. It appears at pages 302-335, inclusive (Waldron); 409-432 (various documents and files produced); 491-539 (Lysfjord); 592-594, inclusive (Lysfjord resumed), and 1181. Defendant's objections to this testimony appears at 278 through 294, 304, 309, 319, 321, 330, 332, 334, 492-493, 498, 504-505, 506, 508, 525, 532, 533, 536 and 1181. Defendant moved to strike that evidence at 717.

3. The court erred in admitting into evidence over objection and in failing to strike from the record upon

motion the testimony of plaintiff Waldron respecting alleged declarations by Robert Ragland regarding activities of Gustave Krause (Crouse) (R. 259, 262-63, 266) and activities of R. E. Howard (R. 269-70). That testimony and defendant's objections thereto are as follows:

“Q. What did Mr. Raglund [*sic*] tell you? A. He was telling us that Mr. Gus Crouse—Coast Insulating Products—came down and was particularly angry, and that he got out of line—

Mr. Black: I would like at this time to interpose an objection, if the court please, on the ground that Mr. Ragland is not shown to have authority to make any statements binding on the Flintkote Company, and that the evidence proffered is incompetent, irrelevant and immaterial. There is no authority of Mr. Ragland to make statements of that sort of an historical character as to what had happened which has been shown.” (R. 259.)

* * * * *

“Q. Will you relate that conversation you had with Mr. Ragland you started to talk about? A. Yes. He was telling me that Gus Crouse of the Coast Insulating Products, a distributor of theirs—

Q. What position, if you know, did Gus Crouse hold with Coast Insulating? A. He was general sales manager. At least, he was at that time.

Q. State what Mr. Ragland told you. A. Mr. Ragland said that he came to their office—or his office and his desk, and got so abusive that he had to tell him he would have to leave him and when he could be more rational he would return.

Now, he was telling him that they wouldn't stand for us, the aabeta co., selling acoustical title.

Q. Did you say—

Mr. Black: Just a moment. I wish the record to show we move to strike this answer in pursuance of our objection.” (R. 262-63.)

* * * * *

“Q. (By Mr. Ackerson): You were talking about Mr. Crouse’s conversation with Mr. Ragland. Did he relate any further part of the conversation, or was that all? A. That is as I remember it at the moment, and anyway, Bob told me that he had to leave Mr. Crouse and then come back at a later date when he was quieted down.” (R. 266.)

* * * * *

“Q. (By Mr. Ackerson): Then at this conversation with Mr. Ragland, did he name other acoustical tile contractors that had approached him concerning your doing business? A. Yes, he said a Mr. R. E. Howard—

Mr. Black: It will be understood our objection goes to this?

The Court: Yes.

The Witness: —was down there complaining, also.

Q. (By Mr. Ackerson): And what did he say that Mr. Howard said, if anything? A. I don’t know any exact words, except he mentioned that they were trying their best to force an issue to stop our operations.” (R. 269-70.)

Defendant moved to strike the aforesaid testimony at the close of plaintiffs’ case (R. 717), and rather extensive argument in support of that motion appears at pages 721 to 733 of the Record.

4. The court erred in admitting into evidence over objection and in failing to strike from the record upon

motion the testimony of plaintiff Lysfjord respecting alleged declarations by Robert Ragland regarding an alleged meeting among Sidney Lewis, R. E. Howard, Gustave Krause, and Charles Newport (R. 474-76), and an alleged conversation between Ragland and Krause (R. 476-480). That testimony and defendant's objections thereto are as follows:

"Q. What was said by Mr. Ragland?

Mr. Black: That, if the court please, is objected to on the ground that this question calls for the eliciting from this witness of some narrative of a past event, that the witness presumably is about to state that Mr. Ragland told him about other people making, having made complaints to the Flintkote Company.

. . .

Mr. Black: The principle we are relying on is a simple point of law of agency. This man is shown to have been an employee of the Flintkote Company. To be sure, there is absolutely no evidence as to the extent of his authority.

The question seems to call for a narration of a past event; not anything done by the declarant himself. It comes under the general rule that Wigmore states in very simple terms as follows:

'Declarations or admissions by an agent on his own authority and not accompanying the making of a contract or the doing of an act on behalf of his principal, nor made at the time he is engaged in the transaction to which they refer, are not binding upon his principal, not being a part of the *res gestae* and are not admissible in evidence but come within the general rule of law excluding hearsay evidence, being but an account or statement by an agent of what is past or been done or admitted to have been done.

Not a part of the transaction but only statements or admissions respecting it.'

That is Section 1078 of Wigmore's text, Vol. 4.

Again on the same principle, Fletcher on Corporation, Section 735, pages 734 to 735:

'It is elementary that an agent cannot bind his principal by declarations which are merely historical and which have no connection with any transaction then being conducted by him, with authority, for his principal. The principle of the exclusion of such evidence is the same as obtains in the ordinary relationship of principal and agent.

'The statements of the latter are inadmissible to affect the former unless, in respect to a transaction in which he is authorized to appear for the principal and he has no authority to bind his principal by any statements as to bygone transactions. Hearsay evidence of this character is only permissible when it relates to statements by the agent, which he was authorized by his principal to make, or to statements by him which constitute part of the transaction which is at issue between the parties.'

Now, we submit in that situation it calls for pure hearsay. No proper foundation has been laid. And that the ordinary rule of principal and agent is applicable to this situation, and the authority of this agent doesn't extend to the making of declarations of past events." (R. 468-471.)

* * * * *

(Extended argument R. 471-474):

"The Court: Objection overruled.

Q. (By Mr. Ackerson): Will you state your conversation with Mr. Ragland on that occasion in January or February prior to the termination meeting? A. Well, Mr. Ragland came into the office,

met me at the office, and mentioned that in his words, things were getting a little bit hot. He said that pressure that you were talking about is starting to show up. The competitors of yours in the field are beginning to pick up your figures and the fact that you are bidding against them around in this general area.

The manager of Howard Company, Mr. Howard, and Mr. Gustave Krause from Coast Insulating, a Sidney Lewis of Flintkote Company—I believe one of the principals there—and Mr. Newport, all had a meeting.

Q. Who is Mr. Newport? A. He is a principal of Coast Insulating. All of these are Flintkote dealers, incidentally.

The Court: Are you telling this as a conversation?

The Witness: I am saying what Mr. Ragland told me.

The Court: Very well.

The Witness: That they had this meeting objecting very strenuously to the fact that we were in business, the aabeta company was in business.

One of the very strongest statements was from Mr. Newport, saying that he would boycott, I believe the word was, all of Flintkote's materials and see that it wasn't used in the area, and he was willing to spend \$40,000 or \$50,000 to do it.

Mr. Black: Just one moment.

I renew our objection, if the Court please. It is now perfectly apparent that this is a narration of alleged events that are purported to have occurred in the past, that it is pure hearsay under the law and the well-settled rule of substantive law of principal and agent, and that the witness is attempting to relate something that has nothing to do with any

duty that Ragland was then performing but merely purports to be something that Ragland told him as to some events that had occurred sometime prior.

The Court: The witness having answered, you want to make that as a motion to strike?

Mr. Black: I make that as a motion to strike.

The Court: If so expansive a tort as conspiracy has a *res gestae* which runs over the period of the conspiracy, suppose it does, this would be part of the *res gestae*.

Mr. Ackerson: It would be part of the *res gestae*.

The Court: And would be admissible then. When I say it would be part of, it would be evidence of, not undertaking to make it binding or to indicate what weight should be given to it.

The motion is denied.

Q. (By Mr. Ackerson): Did Mr. Ragland state the conversation of Mr. R. E. Howard on this occasion? A. Only that he objected very violently. I don't recall the exact words.

Q. What about any statement to Mr. Ragland by Mr. Gustave Krause? A. I don't recall that he said any more at that time. However, there was another meeting where Mr. Gustave Krause did state very violently what he thought of us going into business.

Q. Who told you that?

Mr. Black: That is objected to.

Mr. Ackerson: Yes, you may strike that.

The Court: Yes. Strike the part of the answer that said that he state violently.

You can't characterize a statement as expansive, violent, kindly, gratuitously, gratefully or anything else; you have to just tell us what was said and

the jury will have to decide with what motive it was said.

Q. (By Mr. Ackerson): Did Mr. Ragland relate this conversation to you by Mr. Krause? A. Yes, sir.

Q. Will you state what Mr. Ragland told you, what he said as nearly as you can in substance?

Mr. Black: It will be understood of course that our objection runs to all of this?

The Court: Are you speaking to the objection you urged last week?

Mr. Black: Yes, the objection that it is pure hearsay, that there is no authority in the agent to narrate past events.

The Court: I will understand it but it is just the nature of things that ultimately the examination will shift to something else and sometimes these transitions are so gradual that it is a little difficult to keep track, but I understand that it runs to this one.

Mr. Black: I don't want to keep interrupting, if the Court please, but I do want our record perfected on this point.

The Court: Surely.

The Witness: What was the question again?

Mr. Ackerson: Will you read the question, Mr. Reporter?

(The question referred to was read by the reporter as follows: 'Q. Will you state what Mr. Ragland told you, what he said as nearly as you can in substance?')

Mr. Ackerson: That is concerning Ragland's conversation with Mr. Krause.

The Witness: Mr. Ragland told me that Mr. Krause came into the office and talked—

Q. (By Mr. Ackerson): Into the Flintkote office? A. Into the Flintkote office, and talked so loudly to Mr. Ragland and pounded on the desk a little bit that Mr. Ragland got up and left and told Mr. Krause that if he couldn't talk as a gentleman he didn't want to talk to him any more, and until such time as he could behave as a gentleman, that he, Ragland, would come back and talk with him.

Q. Did Mr. Ragland say what Mr. Krause was talking about? A. He was objecting very strenuously to the aabeta company being in business.

The Court: You cannot say he was objecting. That is a conclusion. You have to tell us what was said and then the jury can decide whether he objected to something or applauded, or something in between.

The Witness: Well, I don't know how else to say it because that was what he was doing.

Mr. Black: You weren't there.

The Court: That is what he was doing? You tell us what he said. Of course you cannot remember it word for word, but you can say in substance he said A, B, C, D, and so forth, and go ahead and relate the substance of the conversations. Then it will be up to the jury to determine whether that was an objection or not.

The Witness: I don't know quite how to answer that.

Q. (By Mr. Ackerson): Did Mr. Ragland—are you relating Mr. Ragland's words to you as far as the word 'objection' goes, or did Mr. Ragland say Mr. Krause used other words? A. He used the word 'objected.' He said, 'I object very much to the aabeta company being in business, in competition with us, using the same type of title.' That is why I keep saying 'objected.' That is the word he used.

The Court: If that is the word he used, that is all right. I thought you were using a word which you thought his words added up to.

The Witness: Oh, no. Mr. Krause very definitely said those words, as I recall what Mr. Ragland told me, that he objected very strenuously to the aabeta company. He used the words 'I object to the aabeta company being in business here in the Los Angeles area, using the same type of acoustical tile that we are a dealer for.'

And that is the time when Mr. Ragland decided to leave, not wanting to listen to the loud conversation, and he told me it was loud. That is not my assumption. He said he didn't like it, so he left. He left for about 10 minutes as I understand it—or I was told rather—and then went back and talked further with Mr. Krause. What they talked further about, I do not know." (R. 474-80.)

Defendant moved to strike the aforesaid testimony at the close of plaintiffs' case (R. 717) and rather extensive argument in support of that motion appears at pages 721 to 733 of the Record.

5. The court erred in failing adequately to instruct the jury that it could return a verdict for plaintiffs only if it found that defendant Flintkote was a party to an unlawful conspiracy in restraint of interstate commerce which injured plaintiffs, and in failing adequately to instruct the jury that defendant Flintkote was the only defendant in the case. The court's instructions in several instances indicate that a verdict for plaintiffs could result if the jury found an unlawful conspiracy among the acoustical contractors who were formerly defendants in the case without regard to whether defendant Flintkote

participated therein. The particular instructions claimed to be erroneous in this respect are as follows:

“The Flintkote Company or anyone else engaged in private enterprise may select its own customers, and in the absence of an illegal contract, combination or conspiracy may sell or refuse to sell to any person, including these plaintiffs, for any cause or for no cause whatever. But under the antitrust laws it cannot do so if there has been a conspiracy.” (R. 1236.)

* * * * *

“Now, you have noted, as I read that, that I mentioned the defendants, but there is only one defendant here. This Complaint, upon which the case is tried and from which I have just read to you, was filed against many defendants. What has happened in the case with respect to the others is not of any concern to you. We are trying the case here today as to this one defendant.

“The defendants, however, are, L. D. Reeder Co. of San Diego; R. E. Howard Company; The Harold E. Shugart Company, Inc.; R. W. Downer Company; Coast Insulating Products; A. D. Hoppe, doing business under the fictitious name and style of The Sound Control Company; The Paul H. Denton Co., Acoustics, Inc.; L. E. Reeder; R. E. Howard; G. H. Morris; Roy Downer, Jr.; Carroll Duncan; Charles L. Newport; Gustave Krause; Paul H. Denton; Acoustical Contractors Association of Southern California, Inc.; The Flintkote Company. It is charged in the Complaint that these defendants conspired, among themselves and with others, to violate the Sherman Act.” (R. 1239.)

* * * * *

“That if The Flintkote Company acted in concert with any one or more of the other defendants here, and the acting in concert was in violation of the law, which I will now read to you, then the conspiracy would be made out.” (R. 1241-42.)

* * * * *

“ . . . I charge you that the combination is illegal and your verdict should be in favor of the plaintiffs as to each defendant whom you find to have knowingly participated therein.” (R. 1245.)

* * * * *

“If you are satisfied from all the evidence that any two or more of the defendants acted together for the purpose and with the effect of eliminating the competition in the purchase, sale or installation of acoustical tile, then you may return a verdict against the defendants and in favor of the plaintiffs, . . .” (R. 1245.)

* * * * *

“The success or failure of the conspiracy is immaterial, but before the defendants may be found to have engaged in such it must be shown that they were active in attempting to further the ends of the conspiracy.” (R. 1240.)

* * * * *

“This means, in a practical way for you, that if you find that Mr. Ackerson was right in his arguments here, and the evidence does show that there was a conspiracy, then even so you cannot undertake to punish it. Your duty is not, if you find that the plaintiffs are right, to take steps to bring about punishment or redressment of the injury which the public suffered, but instead will be to compensate the plaintiffs for the loss which they have sustained.” (R. 1250.)

The court was fully advised that Flintkote objected to all instructions which referred to “defendants” or which did not clearly indicate that only Flintkote’s participation in an unlawful conspiracy could form the basis of a verdict for plaintiffs. This is fully illustrated by the following excerpts from the Record:

“Mr. Black: I think in that same connection it now appears that it would be almost imperative that plaintiffs’ instructions be recast. . . . Because in some instances we even have a situation where you tell the jury that they could find against some but not all the defendants, which, of course, now becomes—” (R. 155-56).

“Mr. Black: . . . We have a good many objections to your instructions, Mr. Ackerson.” (R. 1228.)

“Mr. Black: One other observation. I think it is more a matter of confusion than error. In one of the old instructions there were several defendants in the case, which was given, that stated the jury can bring in a verdict against any defendant they find guilty, which is inappropriate in this action. It might tend to confuse. I think that was inadvertently given that way.

The Court: I think I was reading Judge James’ instructions at the time.” (R. 1258.)

6. The court erred in instructing the jury that the reasonability or unreasonability of any restraint of trade which the jury might find was unimportant and in failing to instruct the jury that only unreasonable restraints of trade are prohibited by the law and that the reasonability of any restraint found by the jury was a question for

the jury to decide. The particular instructions which it is claimed were erroneous are as follows:

“The Flintkote Company or anyone else engaged in private enterprise may select its own customers, and in the absence of an illegal contract, combination or conspiracy may sell or refuse to sell to any person, including these plaintiffs, for any cause or for no cause whatever. But under the antitrust laws it cannot do so if there has been a conspiracy.” (R. 1236.)

* * * * *

“The elimination of competition in interstate commerce by a corporation or by a combination or group of corporations, or competitors, controlling a substantial part of the acoustical tile industry, is an undue, unreasonable and illegal restraint under the Sherman Act, if those parties act in concert by conspiracy, without regard to any economic or financial reasons or advantages derived by the combination or group individually or collectively from such action.

“It is not a question as to what extent competition was affected nor is it a question how reasonable or unreasonable from an economic point of view the restraint of competition may have been. What the law condemns is the power and exercise of such power on the part of an organized group to eliminate competition, and for that reason the law condemns and brands as illegal all attempts to eliminate competition by an organized group, such as has been hypothetically described here.” (R. 1244-45.)

* * * * *

“The law condemns the exercise or the intent to exercise by any person or by combination or group of two or more persons to eliminate competition among or between acoustical tile contractors, so, as

I have stated, if you find such a combination or group and the members of the same had the power to eliminate competition and acted together for that purpose, then I charge you that the combination is illegal and your verdict should be in favor of the plaintiffs as to each defendant whom you find to have knowingly participated therein.” (R. 1245.)

* * * * *

“If you are satisfied from all the evidence that any two or more of the defendants acted together for the purpose and with the effect of eliminating the competition in the purchase, sale or installation of acoustical tile, then you may return a verdict against the defendants and in favor of the plaintiffs, provided the evidence actually shows preponderantly that plaintiffs were damaged by such acts and conduct.” (R. 1245-46.)

* * * * *

“If you find that the defendant, The Flintkote Company, knowingly agreed with one or more of the acoustical tile contractors, named the defendants in this case, to restrict or prevent plaintiffs from competing with such acoustical tile contractors, you are instructed this would be a violation of the law and if you find that this violation resulted in damage to the plaintiffs’ business or property, your verdict should be for the plaintiffs in the amount you find they have been damaged.” (R. 1246-47.)

* * * * *

“This means, in a practical way for you, that if you find that Mr. Ackerson was right in his arguments here, and the evidence does show that there was a conspiracy, then even so you cannot undertake to punish it. Your duty is not, if you find that the plaintiffs are right, to take steps to bring about

punishment or redressment of the injury which the public suffered, but instead will be to compensate the plaintiffs for the loss which they have sustained.” (R. 1250.)

No objection was made to these instructions at the time when they were given. The court was, however, fully aware both of the correct law in this matter and of defendant's position in this regard. At the commencement of the trial, defendant submitted the following instructions dealing with this point:

“DEFENDANT'S INSTRUCTION No. 26.

“Before you can conclude that a combination agreement or concert constitutes an unlawful conspiracy or concert you must determine that its inherent tendency is substantially to lessen, hinder, or suppress competition in the channels of trade or commerce or to monopolize trade or commerce.” (R. 68.)

“DEFENDANT'S INSTRUCTION No. 27.

“Merely because a contract, combination, agreement or concert results in a restraint of trade or commerce, it does not follow automatically that it is of an unlawful nature. Only unreasonable restraints of trade or commerce are condemned by the law.” (R. 68.)

“DEFENDANT'S INSTRUCTION No. 28.

“Whether or not a particular restraint is reasonable or unreasonable is a question of relation and degree.” (R. 69.)

“DEFENDANT'S INSTRUCTION No. 29.

“The true test of the legality of a restraint of trade is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition

or whether it is such as suppresses or destroys competition. In arriving at your determination of this question you must consider the facts peculiar to the business to which the restraint is applied, the nature of the restraint, and its actual effect.” (R. 69-70.)

None of defendant’s above-quoted instructions was given.

7. The court erred in giving to the jury conflicting instructions regarding the necessity of a finding of injury to the public as a prerequisite to a verdict for plaintiffs. Although the court instructed the jury correctly in this regard at page 1249 of the Record, it also gave many instructions which stated or intimated that a verdict could be rendered for plaintiffs without a finding of public injury. These instructions are set out *totidem verbis* in Specification 6, *supra*.

Defendant did not specifically object to this error at the time when the instructions were given. However, defendant’s position in this regard was clearly set forth and was before the court in defendant’s proposed instructions numbered 30, 31, and 32 as follows:

“DEFENDANT’S INSTRUCTION No. 30.

“Before plaintiffs are entitled to recover damages for violations of the antitrust laws they must prove some appreciable harm to the general public in the form of undue or unreasonable restriction of trade and commerce as a result of a wrongful contract, combination, conspiracy, monopoly, or attempt to monopolize.” (R. 70.)

“DEFENDANT’S INSTRUCTION No. 31.

“The element of public injury may not be satisfied by anything less than proof of a substantial effect on the interstate commerce concerned.” (R. 71.)

“DEFENDANT’S INSTRUCTION NO. 32.

“The general public interests have not been injured within the meaning of the law unless the restraint imposed brought about or was reasonably calculated to bring about an increase in prices to the consuming public, a diminution in the volume of merchandise in the competitive markets, a deterioration in the quality of the merchandise available in the channels of commerce, or a similar consequence in the free flow of interstate commerce.” (R. 71-72.)

In fact, the court in its instructions to the jury gave the substance of defendant’s Instructions Nos. 30 and 32 (R. 1249).

8. The court erred in failing to instruct the jury substantially as set forth in Defendant’s Instructions Nos. 24, 25, and 33, which gave specific examples of applications of the law to the testimony in the case and under which the testimony could be construed in such manner as to compel a verdict for defendant. Those instructions were as follows:

“DEFENDANT’S INSTRUCTION NO. 24.

“If you find that plaintiffs, contrary to a condition imposed by The Flintkote Company, invaded a trade territory of established dealers handling Flintkote products, you are instructed that that would be an ample reason of a substantial business character for The Flintkote Company to have refused to make further sales of acoustical tile to plaintiffs. If you find that The Flintkote Company refused to sell acoustical tile to plaintiffs for that reason and not as a consequence of a knowing participation in an unlawful conspiracy, then The Flintkote Company cannot be liable in any respect to plaintiffs for such refusal to sell.” (R. 66.)

“DEFENDANT’S INSTRUCTION No. 25.

“Even if you find that The Flintkote Company declined to sell or discontinued selling acoustical tile to plaintiffs as the result of pressure brought upon The Flintkote Company by other persons, The Flintkote Company would not thereby participate in any unlawful conspiracy if it did not know that such conspiracy existed; and you cannot infer knowledge of such conspiracy solely from the fact, if it be the fact, that The Flintkote Company yielded to such pressure.” (R. 67.)

“DEFENDANT’S INSTRUCTION No. 33.

“There is nothing inherently unlawful in a manufacturer’s establishing the policy of limiting the number of distributors in a given area. If you find that such a policy was established by The Flintkote Company for the purpose of promoting good relations with its own customers and furthering its own legitimate business interests and was not done for the purpose of bringing about an unlawful restraint of trade or the creation of a monopoly, there would be no violation of the antitrust laws in the establishment or maintenance of such a policy by The Flintkote Company.” (R. 72-73.)

No specific objection was made to the failure to give those instructions at the time when the court instructed the jury. Those requested instructions were, however, before the court at all times during the trial, and it was clear at all stages of the trial that defendant’s defense rested on the theories expressed in those instructions. See Answer of The Flintkote Company to First Amended Complaint (R. 45-47), argument of defendant’s counsel (R. 748-53), Defendant’s Opening Statement (R. 773-77), argument of defendant’s counsel (R. 286-89).

9. The court erred in failing to instruct the jury regarding the burden of proof substantially as set forth in Defendant's Instruction 14 (New), which reads as follows:

“DEFENDANT'S INSTRUCTION NO. 14 (NEW).

“In this case plaintiffs have the affirmative of all issues and they must carry the burden of proving all the issues. This ‘burden of proof’ means that if no evidence were given on either side of an issue, your finding as to it would have to be against the plaintiffs. When the evidence is contradictory, the decision must be made according to the preponderance of evidence, by which is meant such evidence, as, when weighed with that opposed to it, has more convincing force, and from which it results that the greater probability of truth lies therein. Should the conflicting evidence be evenly balanced in your minds so that you are unable to say that the evidence on either side of the issue preponderates, then your finding must be against the plaintiffs.” (R. 57-58.)

Defendant's objection in this regard is found in the following colloquy:

“Mr. Doty: For the record, I think we should have our 14 new on burden of proof, which said that the plaintiff has the burden of proof on all issues, and that in the event he does not sustain the burden of proof, they are to find for the defendant. I don't think that was ever stated.

The Court: There were many instructions submitted on that particular issue. I selected one and did not wish to repeat.” (R. 1257.)

10. The court erred in failing to instruct the jury regarding the burden of proof of damages substantially as set forth in Defendant's Instruction 42, which reads as follows:

“DEFENDANT’S INSTRUCTION NO. 42.

“Even if plaintiffs convince you that The Flintkote Company has engaged in conduct prohibited by the antitrust laws and which has resulted in injury to the public, that, by itself, does not give plaintiffs the right to recover damages. Plaintiffs must go still farther, and the burden of proof is upon them to show some real and actual pecuniary loss or damage by reason of such unlawful conduct. There is no duty imposed by the law upon a defendant to show that its acts have not worked injury to a plaintiff. On the contrary, the duty and burden of proving injury to their business or property is imposed by law upon the plaintiffs, and, unless they prove this fact of injury to their business or property as a result of such conduct by a preponderance of the evidence, they cannot recover damages.” (R. 79-80.)

Defendant’s objection in this regard is found in the following colloquy:

“Mr. Doty: I noted our 42 we thought should be given.

The Court: I understood that was in the series.” (R. 1259.)

11. The court abused its discretion in failing to grant defendant a new trial on one or more of the following grounds:

- a. the verdict was not supported by legally sufficient evidence;
- b. the verdict was against the weight of the evidence;
- c. the damages fixed by the jury were excessive.

12. The court erred in instructing the jury with regard to the period and acts for which damages were recoverable and in failing to instruct the jury in that regard

substantially as requested by defendant. The court instructed the jury as follows:

“Plaintiffs’ recovery in this action, if any, must be limited to damages resulting from the inability of plaintiffs to purchase acoustical tile from Flintkote on a direct basis during the period February 19, 1952, to the time of the beginning of this trial.” (R. 1254.)

Defendant’s objection is contained in the following colloquy:

“Mr. Doty: We believe that our instructions 46-A through 46-F should be given. It is on an entirely different theory of damages from the one stated, but, for the record, we would like to insist that they be given.

The Court: The insistence is noted and I have given them as far as I feel that I properly can.

Mr. Doty: I take it that it is sufficient if we specify 46-A through 46-F, without specifying which is new, because, obviously, we only want the latest version of those.

The Court: The court will protect you by saying that I understand the exception and I deliberately and knowingly decline to give all the instructions just mentioned.” (R. 1257.)

Defendant’s requested instructions 46(a) through 46(f) as they existed at the time when the court instructed the jury are as follows:

“DEFENDANT’S INSTRUCTION No. 46(a)(New).

“In the event you should determine that under the law as stated to you plaintiffs are entitled to damages in some amount, you will guide yourself in the computation of that sum by the following rules:

“(a) Plaintiffs could not have sustained recoverable damages by reason of acts for which The Flintkote Company may be responsible prior to February 19, 1952, that being the date that The Flintkote Company advised plaintiffs that they would no longer sell acoustical tile to them except to cover plaintiffs’ outstanding commitments.” (R. 83.)

“DEFENDANT’S INSTRUCTION No. 46(b)(c).

“(b) Plaintiffs would be entitled to recover for injuries sustained prior to July 21, 1952, that being the date this action was instituted.

“(c) Plaintiffs would be entitled to recover for injuries sustained subsequent to July 21, 1952 only in the event that the preponderance of the evidence convinces you that such injuries occurred as a consequence of acts done before July 21, 1952. In other words, you are not to concern yourselves with acts, including refusals by The Flintkote Company to sell plaintiffs acoustical tile, which occurred after July 21, 1952; plaintiffs are not entitled to recover damages in this action for injuries, if any there were, resulting from such acts.” (R. 84.)

“DEFENDANT’S INSTRUCTION No. 46(d)(New).

“(d) Therefore, plaintiffs would be entitled to recover only for damages sustained, if any, as a consequence of acts for which The Flintkote Company is responsible and occurring between February 19, 1952, and July 21, 1952.” (R. 85.)

“DEFENDANT’S INSTRUCTION No. 46(e).

“(e) Plaintiffs’ recovery in this action, if any, must be limited to damages resulting from the inability of plaintiffs to purchase acoustical tile from Flintkote on a direct basis during the period February 19, 1952 to July 21, 1952.” (R. 86.)

“DEFENDANT’S INSTRUCTION No. 46(f).

“(f) Plaintiffs cannot recover in this action any damages which may have resulted from their inability to obtain acoustical tile from the defendant Flintkote on a direct basis during any period commencing on or after July 21, 1952.” (R. 87.)

13. The Court erred in admitting into evidence and failing to strike from the record upon motion Plaintiffs’ Exhibits 38, 39, and 43 and certain testimony of plaintiffs in connection therewith. The testimony objected to is that of plaintiff Lysfjord appearing at pages 594-99, 600-603, 622-31 of the Record, and of plaintiff Waldron appearing at pages 680-85, 686-92 of the Record.

Plaintiffs’ Exhibit 38 is a statement purporting to be a tabulation of estimated damages sustained by plaintiff Waldron, which is in words and figures as follows:

Walter Waldron—

Recap of Loss Figures:

Commissions & Expected profits		
7 months @ \$2,500.00 per month	\$17,500.00	
San Bernardino Expense	\$ 960.00	
Total	\$18,460.00	
Less ½ of 1st year actual profit	\$ 1,215.00	
Net total lost	\$17,245.00	
<hr/>		
Actual cost of tile purchased	\$87,808.97	
Estimated cost from distributor		
Based upon 17% overpayment for tile	\$66,503.40	(\$75,050.40)
Total overpayment due to restraint of adequate supply	\$21,305.57	(\$12,758.57)
Share of above chargeable to Walter Waldron	\$10,652.78	(\$ 6,379.28)
<hr/>		

Average Earnings—R. W. Downer Co. \$ 1,250.00

Approximate profit based upon a 30% mark-up divided 10% for overhead; 10% salesman commission; 10% profit for company.

Approximate profit for Walter Waldron as an owner in business for himself would be:

\$1,250.00 as salesman's profit

\$1,250.00 as owner's profit

\$ 2,500.00 per month

Income for first seven months equals

7 x \$2,500.00 or

\$17,500.00

San Bernadino [*sic*] Expenses:

Rent @ \$60.00 per month for 1 year

\$ 720.00

Promotional Expense & advertising

500.00

Utilities & Trucking expense

700.00

\$ 1,920.00

Share of expense by Walter Waldron

\$ 960.00

Total Loss by Walter Waldron

\$18,460.00

Approximate cost of 1 carload of tile is \$6,000.00; Average sales price of 1 carload of tile is \$18,000.00; approximately 30% of \$18,000.00 is gross profit. Thus the approximate gross profit on 1 carload of tile is \$5,400.00.

During the first year of business an average of one carload of tile per month would result in a gross profit of \$64,800.00. This gross profit would be divided up as follows:

Overhead $\frac{1}{3}$ of \$64,800—\$21,600.00

Profit—Walter Waldron —\$21,600.00

Profit—Elmer Lysfjord —\$21,600.00

Based upon 1 carload per month during 1952, Walter Waldron would have a profit of

\$21,600.00

Based upon $1\frac{1}{2}$ carloads per month during the second year the profit to Walter Waldron would be

\$32,400.00

Based upon 2 carloads per month during the third year the profit to Walter Waldron would be

\$43,200.00

Total estimated profits during the three year period would have been	\$97,200.00	
Actual profit earned during the three year period were	\$21,411.50	
Total estimated loss due to restraint of Supply		<u>\$75,788.50</u>

Exhibit 39 is a statement purporting to be a tabulation of estimated damages sustained by plaintiff Lysfjord, which is as follows:

Elmer Lysfjord—

Recap of Loss Figures

Commissions & Expected profits	
7 months @ \$3,160.00 per month	\$22,120.00
San Bernardino Expense	\$ 960.00
Total	<u>\$23,080.00</u>
Less ½ of 1st year actual profits	\$ 1,215.00
Net total loss	<u>\$21,865.00</u>

Actual cost of tile purchased	\$87,808.97	
Estimated cost from distributor based upon 17% overpayment for tile	\$66,503.40	(\$75,050.40)
Total overpayment due to restrain [sic] of adequate supply	\$21,305.57	(\$12,758.57)
Share of above chargeable to Elmer Lysfjord	\$10,652.78	(\$ 6,379.28)

Average Earnings—R. W. Downer Co. \$ 1,580.00 per month

Approximate profit based upon a 30% mark-up divided 10% for overhead; 10% salesman commission; 10 [sic] profit for company.

Approximate profit for Elmer Lysfjord as an owner in business for himself would be:

\$1,580.00 as salesman's profit	
\$1,580.00 as owner's profit	\$ 3,160.00 per month

Income for first seven months equals	
7 x \$3,160.00 or	\$22,120.00

San Bernardino Expense:

Rent @ \$60.00 per month for 1 year	\$ 720.00
Promotional Expense and advertising	\$ 500.00
Utilities & Trucking Expense	\$ 700.00
Total	<u>\$ 1,920.00</u>

Share of expense [<i>sic</i>] by Elmer Lysfjord	\$ 960.00
Total loss by Elmer Lysfjord	<u>\$23,080.00</u>

Approximate cost of 1 carload of tile is \$6,000.00; average sales price of 1 carload of tile is \$18,000.00; approximately 30% of \$18,000.00 is gross profit. Thus, the approximate gross profit on 1 carload of tile is \$5,400.00.

During the first year of business an average of one carload of tile per month would result in a gross profit of \$64,800.00. This gross profit would be divided up as follows:

Overhead: $\frac{1}{3}$ of \$64,800	—\$21,600.00
Profit—Walter Waldron	—\$21,600.00
Profit—Elmer Lysfjord	—\$21,600.00

Based upon 1 carload per month during 1952 Elmer Lysfjord would have a profit of \$21,600.00

Based upon $1\frac{1}{2}$ carloads per month during the second year the profit to Elmer Lysfjord would be \$32,400.00

During the third year the profit to Elmer Lysfjord, based upon 2 carloads of tile per month, would be \$43,200.00

Total Estimated profits during the three year period would have been \$97,200.00

Actual profit earned during the three year period were \$21,411.50

Total estimated loss due to restraint of supply \$75,788.50

Exhibit 43 is a statement which is called "Damages Based Upon Past Earnings Only" which is as follows:

DAMAGES BASED UPON PAST EARNINGS ONLY

(based upon earnings of both plaintiffs with Downer Company projected into a 36-month period—January 1, 1952 to January 1, 1955.)

\$1,250.00 per month per each plaintiff, or \$ 2,500.00 per month for both plaintiffs during period equals:	\$90,000.00
Actual profits from aabeta company during said period (January 1, 1952 to Jan. 1, 1955) for both plaintiffs:	\$42,823.00
Net loss based upon past earnings only:	\$47,177.00
Plus estimated profit as owners on same amount of sales made for Downer Company; i.e., 10% constituting the \$90,000.00, equals:	\$90,000.00
Total loss of salary only:	\$47,177.00
Total loss of normal profits as owners:	90,000.00
Total loss for same three-year period:	<hr/> \$137,177.00

In connection with the second tabulation on Exhibits 38 and 39, plaintiffs' accountant on cross-examination admitted that he had made an error in his calculation (R. 576), and the second, third and fourth figures in the tabulation were changed as follows (R. 622, 684): the figure \$66,503.40 was changed to read \$75,050.40; the figure \$21,305.57 was changed to read \$12,758.58; and the final figure was changed from \$10,652.78 to read \$6,379.28. We have inserted the amended figures in parentheses opposite the figures appearing on the original exhibits.

The plaintiffs' oral testimony with respect to alleged damages consisted almost entirely of an explanation of the figures appearing on these exhibits and would be unintelligible without reference to the exhibits. Therefore

no attempt will be made to quote or paraphrase the oral testimony as such. The general effect of it will be sufficiently brought out by the following brief statement of the figures appearing on Exhibits 38 and 39.

The first table on Exhibit 38 is based on the assumption that plaintiff Waldron earned on the average, while he was employed by the R. W. Downer Company, \$1250.00 per month. It is further assumed that this figure is equivalent to 10% of the gross profit on jobs performed. The witness then assumes that in his own business he would perform as much work for himself as was done as a salesman for Downer, that as owner he would receive an additional 10% of the gross profit, and that he would therefore earn \$2500.00 per month. From this he estimates the profits he should have made in operating his own business for a seven-months' period as \$17,500.00. He then adds one-half of certain expenses incurred at San Bernardino, or \$960.00, and arrives at a total of \$18,460.00. From this he deducts one-half of the actual profits realized by the aabeta company for 1952, or \$1215.00, and claims a net loss for the seven-month period of \$17,245.00. A similar calculation is made on Exhibit 39 for plaintiff Lysfjord, but this is based on alleged average earnings with Downer of \$1580.00 per month, and results in an alleged net loss for a seven-month period of \$21,865.00.

The last tabulation on Exhibits 38 and 39 is based on the assumption that plaintiffs would sell a carload of tile per month for the first year of their business, a carload

and a half per month during the second year, and two carloads per month during the third year. They further assume that the gross profit on each carload of tile is \$5,400.00, and that each plaintiff would realize one-third of this sum as his own profit. This calculation results in a total estimated profit for each of the plaintiffs for a three-year period in the amount of \$97,200.00. From this, one-half of the actual profit earned by the plaintiffs during that period, or \$21,411.50, is then deducted, resulting in a figure for each of the plaintiffs in the amount of \$75,788.50.

Exhibit 43 is based on the assumptions that each plaintiff earned \$1,250.00 per month with the Downer Company, or a total for the two plaintiffs of \$2,500.00 per month, and that in their own business, if they had been able to purchase tile from Flintkote, they would have earned twice what they earned while with Downer, or, in a three-year period, \$180,000.00. From this figure they subtracted their actual profits for the period of \$42,823.00 and claimed a total loss of profits in the amount of \$137,177.00. The record with respect to the offer of these Exhibits, the objections thereto, and the court's ruling is as follows:

"Mr. Ackerson: Your Honor please, I will offer Exhibits 38, 39—I will take them separately.

I will offer Exhibit 38 in evidence as a tabulation of this witness' estimate of his damages.

Mr. Black: To which we object, the court please, on the ground that no foundation whatever has been laid for the figures showing in this document.

It has been proved demonstrably erroneous. It is based on the sheer speculation of these witnesses on completely gratuitous assumptions, events that have no basis in the evidence as possibly foreseeable.

And for the further reason it extends, obviously, the damages beyond the recoverable period in this action, namely, the date of filing of suit.

For all of these reasons and the further grounds that it is incompetent, irrelevant and immaterial, we object.

The Court: What is the foundation for it, Mr. Ackerson? State it fully for the record.

Mr. Ackerson: The foundation, your Honor, has been the manner in which the documents have been prepared, the basis of them and the purpose of the introduction is limited to a physical exhibit of the opinion evidence of this witness.

The Court: Objection overruled. Document admitted.

(The document heretofore marked Plaintiffs' Exhibit 38 was received in evidence.)

Mr. Ackerson: I will offer for the same limited purpose Exhibit 39.

Mr. Black: We interpose the same objection to this document, if the court please.

The Court: Same ruling.

(The document heretofore marked Plaintiffs' Exhibit 39 was received in evidence.)

Mr. Ackerson: And I will offer for the same purpose, same limited purpose, Exhibit 43 for identification.

Mr. Black: To which we make the same objection, and the further objection to this document is that this builds speculation upon speculation.

This last document is predicated on the assumption that these people, establishing their own new business, would start out making precisely the same volume that they did with another company, financed by a company that was adequately financed. And gratuitously assuming that they are going to have the benefits of an owner immediately.

They start in business as of the first of the year when, on their own testimony, they didn't even start operations in the way of making any money after they got their business organized for several months.

It just is demonstrably inaccurate in every possible view. On those reasons and for the others we object to this.

The Court: The further reason goes to the weight of the evidence, what weight will a jury give it. They may accept it in whole or they might accept it in part or they may reject it.

It might be subject, as an estimate, to considerable modification before it is accepted, if it is ever accepted at all, as an appropriate measure of damages, if any are awarded.

The objection is overruled. The document is admitted." (R. 692-694.)

The foregoing summarizes the objections and motions to strike that were made during the course of the testimony explaining these Exhibits. Such objections appear at pages 602, 603, 628, 629 and 630. These objections were largely based on the ground that the figures appearing in the Exhibits were unsupported by anything in the record and consisted of mere speculation by the plaintiffs. The further objection was made that plaintiffs could not

recover as a matter of law for any damage arising out of their inability to purchase tile from Flintkote subsequent to the commencement of the suit. Extended argument on this point appears at pages 603 through 621 of the transcript.

14. The court erred in fixing the fee of plaintiffs' attorney at \$25,000, which sum is clearly unreasonable.

15. The court erred in determining that the \$20,000 paid to plaintiffs by former defendants in this action in consideration of the dismissal of the action against them and a covenant not to sue should be credited against the judgment for treble the damages found by the jury, when such \$20,000 should have been credited against the damages found by the jury before the same were trebled. The Court's "Memorandum of Decision" (R. 116-24) clearly indicates that the question was properly before the court and that the court was fully aware of defendant's position in the matter.

ARGUMENT.

Summary of Argument.

The judgment below should be reversed and this court should enter judgment for defendant. Defendant's motion to set aside the verdict should have been granted. Viewing all the evidence in the light most favorable to the plaintiffs, the direct testimony that defendant had no knowledge of, and did not participate in any conspiracy has not been impugned.

Even if this court does not order judgment for defendant, a new trial should be granted because of numerous prejudicial errors committed by the trial court.

Two major errors were made in the admission of evidence: (1) Evidence tending to show that the acoustical contractors had an arrangement to fix prices and allocate bids was received over Flinkote's objection despite the fact that no connection between Flinkote and such conspiracy was proved. This was highly prejudicial, as the jury might well have reached the conclusion that the mere presentation of this testimony was some evidence of Flinkote's participation. (2) The court permitted the plaintiffs to testify regarding certain hearsay declarations of a purely historical nature allegedly made by Robert Ragland, a subordinate employee of Flinkote, although there was no showing of Ragland's authority to make such declarations or that he was at the time engaged in any transaction on behalf of his principal. The testimony was not admissible under any rule of evidence.

There were many errors in the court's charge to the jury. These were five in number:

1. Confusing and misleading instructions were given concerning recovery against "any defendant" participat-

ing in a conspiracy (although Flintkote was the only defendant) without making it clear that Flintkote's participation in such conspiracy would be a prerequisite to a verdict for plaintiffs.

2. The "rule of reason" was not properly explained.

3. The necessity of public injury was not clearly brought out in several "formula instructions."

4. The court failed to give proper instructions requested by defendant showing the specific application of defendant's theory of the case.

5. The court failed to give adequate instructions on the burden of proof.

The court abused its discretion by refusing to grant defendant's motion for a new trial on the ground that the verdict was against the weight of the evidence.

The damages allowed were grossly excessive and numerous errors were committed in connection therewith:

1. The court improperly admitted evidence and gave instructions based on a misconception of the damage period. Damages should have been limited to those resulting from plaintiffs' inability to purchase tile from Flintkote on a direct basis up to the time the suit was filed (July 21, 1952). The court permitted the damages to be based on such inability to purchase tile up to the time of the trial in May, 1955, although there was no evidence of any conspiracy after the summer of 1952.

2. The court received evidence of damage based on pure guess work and speculation.

3. The court abused its discretion by failing to grant a new trial on the ground that the damages were excessive. The amount of the verdict was far in excess of any actual damages proved.

The court allowed an excessive attorney's fee.

The court erred in its disposition of the \$20,000 paid by former defendants in this case in exchange for a covenant not to sue and a dismissal filed before this action commenced. This sum should have been deducted from the damages fixed by the jury; instead of that, the court deducted it from the judgment after trebling the jury's verdict.

I.

There Was No Credible Evidence That Flintkote Knowingly Participated in an Unlawful Conspiracy. The Trial Court Erred in Denying Defendant's Motion to Set Aside the Verdict, and This Court Should Order Judgment Entered for Defendant.

(Specification of Error No. 1, p. 11.)

In this first section of the brief we shall state our reasons for our contention that this case should not have been allowed to go to the jury; that Flintkote's motions for directed verdict at the close of plaintiff's case and at the close of all of the evidence should have been granted; and that the trial court also erred in denying defendant's motion to set aside the verdict and enter judgment for defendant. If this Court agrees with us, it follows that the judgment appealed from must be reversed, and judgment should be ordered for defendant.

The question raised by Flintkote's motion to set aside the verdict and enter judgment for defendant was whether

substantial evidence had been presented which, if believed by the jury, would authorize a verdict against Flintkote.

Sivert v. Pennsylvania R. Co., 197 F. 2d 371 (7th Cir., 1952);

Audirsch v. Texas & Pacific Ry. Co., 195 F. 2d 629 (5th Cir., 1952);

MacKay v. Costigan, 179 F. 2d 125 (7th Cir., 1950).

The theory on which the case was tried was that Flintkote was a knowing participant in a conspiracy among the acoustical contractors in the Los Angeles area (R. 168). Evidence was received which tends to show (1) a conspiracy existed among the acoustical contractors to fix prices and allocate jobs (*e.g.*, R. 491-503, 504-36); (2) certain Flintkote contractors (we use the term "Flintkote contractors" to mean the acoustical contractors to whom Flintkote sold tile in the Los Angeles area) objected to Flintkote about plaintiffs doing business in Los Angeles (*e.g.*, R. 949-52, 1046-48, 1124-29, 1151-52); (3) one of the Flintkote contractors allegedly threatened to boycott Flintkote if it did not cut plaintiffs off (R. 475). This evidence was admitted, over objection, and as will be pointed out, *infra*, prejudicial error was thereby committed); (4) Flintkote cut plaintiffs off (*e.g.*, R. 239-41). With minor elaborations, that is the state of the evidence in the light most favorable to plaintiffs and resolving every conflict in their favor. The jury apparently concluded that Flintkote joined in the contractors' conspiracy when it cut plaintiffs off. The question now before this court is whether the jury could reasonably so conclude from the evidence, or, stated otherwise, whether there is any evidence in the record supporting the jury's conclusion.

Without considering the weight of the evidence, there is probably enough testimony in the record to support a conclusion that Flintkote cut off the plaintiffs as a result of the activities of the Flintkote contractors in complaining to Flintkote. If the evidence as to threats were properly admissible, one might perhaps conclude that Flintkote cut off plaintiffs because of those threats. However, neither of those conclusions, without more, will support a verdict that Flintkote violated the antitrust laws by cutting off plaintiffs.

The general rule is that The Flintkote Company, or anyone else engaged in private enterprise, may select its own customers and may sell or refuse to sell to any person, including these plaintiffs, for any cause or for no cause whatever.

United States v. Colgate & Co., 250 U. S. 300, 39 S. Ct. 465 (1919);

Times-Picayune Pub. Co. v. United States, 345 U. S. 594, 73 S. Ct. 872, 889 (1953);

Johnson v. J. H. Yost Lumber Co., 117 F. 2d 53, 61-62 (8th Cir., 1941);

Chicago Seating Co. v. S. Karpen & Bros., 177 F. 2d 863 (7th Cir., 1949);

Nelson Radio & Supply Co. v. Motorola, 200 F. 2d 911 (5th Cir., 1952), *cert. denied*, 345 U. S. 925, 73 S. Ct. 783 (1953);

Blue Bell Co. v. Frontier Refining Co., 213 F. 2d 354 (10th Cir., 1954).

The seller's freedom of selection is abridged only when the refusal to sell is the result of a knowing participation in a conspiracy violative of the antitrust laws.

Johnson v. J. H. Yost Lumber Co., *supra*, 62;

Interborough News Co. v. Curtis Publishing Co., 127 F. Supp. 286, 301 (S. D. N. Y., 1954).

The issue, then, is whether the evidence will support a finding of “knowing participation” in an unlawful conspiracy. The requirement is dual: it requires *both* knowledge *and* participation, and neither is sufficient without the other. See, *e.g.*,

United States v. Falcone, 311 U. S. 205, 61 S. Ct. 204 (1940),

where the court said, beginning at page 206 of 61 S. Ct.,

“Respondents . . . cannot be brought within the sweep of the Government’s conspiracy dragnet if they had no knowledge that there was a conspiracy.

“The gist of the offense of conspiracy . . . is agreement among the conspirators to commit an offense attended by an act of one or more of the conspirators to effect the object of the conspiracy. [citing cases] Those having no knowledge of the conspiracy are not conspirators, [citing cases]; and one who without more furnishes supplies to an illicit distiller is not guilty of conspiracy even though his sale may have furthered the object of a conspiracy to which the distiller was a party but of which the supplier had no knowledge.”

Weniger v. United States, 47 F. 2d 692 (9th Cir., 1931),

where the court said, at page 693:

“The failure of a person to prevent the carrying out of a conspiracy, even though he has the power so to do, will not make him guilty of the offense without further proof that he has in some affirmative way consented to be a party thereto. Neither will the commission of an overt act, though unlawful in itself, be enough to show that the actor was a party to the conspiracy. The law requires proof of the

common and unlawful design and the knowing participation therein of the persons charged as conspirators before a conviction is justified.”

and,

United States v. Dried Fruit Ass'n of California,
4 F. R. D. 1 (N. D. Cal., 1944),

where the court instructed the jury, at page 7, that

“Each party must be actuated by an intent to promote the common design. . . . Co-operation in some form must be shown. There must be intentional participation in the transaction with a view and purpose to further the common design.”

Let us consider first whether there was evidence to support a finding that Flintkote *knew* of the conspiracy. There is no evidence that any Flintkote officer or employee actually knew of the conspiracy among the contractors. All of the direct evidence on that point is that they did *not* know. The only direct evidence of the state of Flintkote's knowledge respecting the existence of any conspiracy among the contractors is the testimony of Ragland (R. 815-16), Thompson (R. 1039), Lewis (R. 1049), Baymiller (R. 955-56), Heller (R. 1112-13) and Harkins (R. 1072), that each of them knew nothing about any conspiracy among the contractors. The fact that the *Flintkote* contractors individually approached Flintkote to complain about plaintiffs being in business will not support the conclusion that Flintkote knew the contractors were conspiring together to drive plaintiffs out of business.

Johnson v. J. H. Yost Lumber Co., supra.

Certain testimony of Lysfjord was admitted over objection respecting Ragland's alleged declarations concerning an alleged meeting among Flintkote and the Flintkote

contractors at Flintkote's office (R. 474-76). We contend that the testimony was improper and should be disregarded; and further, that there was no such meeting. But even if the testimony were admissible, it would not show any knowledge on Flintkote's part that a conspiracy existed among the contractors. There is no indication of who called the supposed meeting or the purpose thereof. The only testimony about the meeting is that *one* of the contractors allegedly present *individually* made an *individual*, not a collective, threat against Flintkote. There is no evidence that any concerted action was taken by any two or more persons at that meeting; there is nothing to show any agreement or concert of action among the persons present at the meeting. That testimony tends to show only two things: (1) that an individual threat was made by one Flintkote contractor; and (2) that Flintkote met with two of its contractors and plaintiffs were mentioned.

Clearly the fact of threats (assuming there were threats) will not support an inference of knowledge of a conspiracy;

Johnson v. J. H. Yost Lumber Co., supra,

and this should especially be so when all the evidence is that there was but one threat of individual and not concerted action.

Even assuming the alleged meeting took place, it should be equally apparent that the fact of a meeting among Flintkote and *its* contractors cannot support any inference that Flintkote knew of a conspiracy among all the contractors. If representatives of a non-Flintkote contractor had been present at the supposed meeting, an inference of notice to, or perhaps even knowledge by, Flint-

kote of a conspiracy might be permissible, but not otherwise. There are too many reasonable and lawful explanations for a meeting among Flintkote and its contractors to permit the inference of knowledge of conspiracy from the fact of meeting. (It is not disputed that the fact of the meeting, if it were the fact, is one circumstance which, in combination with others, might show that Flintkote joined a conspiracy or conspired with the contractors, if knowledge by Flintkote of the existence of the conspiracy were shown. However, the fact of the meeting is of no value in determining whether Flintkote *knew* of the conspiracy.)

The only evidence tending to show that Flintkote might have had even *reason to know* of the existence of the conspiracy is Waldron's testimony (R. 197) (only partially confirmed by Lysfjord at R. 449-50) that he told Thompson at the Manhattan Supper Club (3 months before the cut-off and before any arrangement had been made between Flintkote and plaintiffs) that if plaintiffs went into business in Los Angeles, it "would cause a lot of ill feelings among the general acoustical contractors in the city." "I told them [Flintkote] that they [acoustical contractors] were organized here and they didn't plan to have or would be very unhappy if they had a competing contractor in the field because they weren't competing with each other any more." "Mr. Thompson assured us that no amount of pressure would intimidate The Flintkote Company, that they were too big for that." Waldron's testimony indicated that the entire conversation on the point is substantially quoted above.

Waldron's remark to Thompson, assuming it was made, could not charge Flintkote with knowledge that there was a conspiracy in restraint of trade among the Los Angeles

acoustical contractors. The discussion was short. It could have been dismissed by Thompson as indicating that there was enough acoustical business to support all of the men acoustical contractors without cut-throat price competition (and without combination) and that the contractors would be upset if someone new entered the field and upset that condition. It might well have been dismissed by Thompson as mere conjecture by Waldron reflecting his own fears at entering any competitive and established business and without foundation in fact. It certainly did not prove the existence of a conspiracy, and, at most, it indicated that Waldron thought there might be one. Thus, it might have given Thompson some notice of the possibility that a conspiracy *might* exist. It did not have sufficient status to give Thompson reason to know of the existence of the conspiracy.

Even if it were assumed that Waldron's statements gave Flintkote reason to know that a conspiracy might exist among the contractors, one should not be permitted to infer that Flintkote did in fact know thereof. *Knowing participation* in the conspiracy is prerequisite to liability, not merely doing an act in fact in furtherance of the objects of a conspiracy with reason to know that a conspiracy might exist.

Johnson v. J. H. Yost Lumber Co., supra;

United States v. Falcone, supra;

Marino v. United States, 91 F. 2d 691, 694-96 (9th Cir., 1937), *cert. denied, sub nom.*

Gullo v. United States, 302 U. S. 764, 58 S. Ct. 410 (1938).

The test would appear to be *subjective, i.e.*, whether defendant actually knew, not *objective, i.e.*, whether defendant

had reason to know, or could have known, or even should have known.

It is apparent that no bit of testimony above discussed is by itself sufficient to support an inference that Flintkote knew about a conspiracy among the contractors. It should be equally apparent that, even in combination, all of the items of testimony will not support an inference that Flintkote *subjectively* and *actually knew* of the existence of a conspiracy. As noted above, there is absolutely no direct evidence of knowledge. All the direct evidence affirmatively shows lack of knowledge. True enough, circumstantial evidence *could* prove knowledge. But it is submitted that knowledge by Flintkote of the existence of a conspiracy among the contractors may not be inferred from the circumstances as to which there is testimony in this case.

All of the circumstances and evidence in this case are consistent with *lack* of knowledge by Flintkote of any conspiracy among the contractors. At most, the circumstances (other than the direct testimony of lack of knowledge) are equally consistent with knowledge and with lack of knowledge on Flintkote's part.

"We, therefore, have a case belonging to that class of cases where proven facts give equal support to each of two inconsistent inferences; in which event, neither of them being established, judgment, as a matter of law, must go against the party upon whom rests the necessity of sustaining one of these inferences as against the other, . . ."

Pennsylvania R. Co. v. Chamberlain, 288 U. S. 333, 339, 53 S. Ct. 391, 393 (1933).

“If the testimony leads as reasonably to one hypothesis as to another, it tends to establish neither.”

Deadrich v. United States, 74 F. 2d 619, 622 (9th Cir., 1935);

United States v. Holland, 111 F. 2d 949, 953 (9th Cir., 1940);

Galloway v. United States, 130 F. 2d 467, 470 (9th Cir., 1942), *affirmed*, 319 U. S. 372, 63 S. Ct. 1077 (1943).

“ ‘When the evidence tends equally to sustain either of two inconsistent propositions, neither of them can be said to have been established by legitimate proof. A verdict in favor of the party bound to maintain one of those propositions against the other is necessarily wrong.’ ”

Pennsylvania R. Co. v. Chamberlain, *supra*, at 340 of 288 U. S. and 393-94 of 53 S. Ct., quoting from

Smith v. First National Bank in Westfield, 99 Mass. 605, 611-12.

It is thus apparent that, since lack of knowledge by Flintkote of any conspiracy is perfectly consistent with all of the circumstances of the case, those circumstances cannot form the basis of a finding that Flintkote had such knowledge.

“And the desired inference is precluded for the further reason that respondent’s right of recovery depends upon the existence of a particular fact which must be inferred from proven facts, and this is not permissible in the face of the positive and otherwise uncontradicted testimony of unimpeached witnesses consistent with the facts actually proved, from which

testimony it affirmatively appears that the fact sought to be inferred did not exist.”

Pennsylvania R. Co. v. Chamberlain, *supra*, 288 U. S. at 340-41, 53 S. Ct. at 394.

The direct and positive testimony as to lack of knowledge must prevail over any contrary inference from circumstances equally consistent with the positive testimony.

In discussing proof of facts by circumstantial evidence, Wigmore, at

I Wigmore on Evidence, §41, p. 439 (3d ed., 1940),

quotes from *New York Life Ins. Co. v. McNeely*, 79 P. 2d 948 (Ariz., 1938), as stating the correct rule as follows:

“ . . . In criminal cases, they demand that when a conviction is to be based on a chain of inferences, each and every link in that chain must exclude every other reasonable hypothesis. In civil cases, involving only property rights, the rule is not so strict, and it is sufficient, if the ultimate fact is to be determined by an inference from facts which are established by direct evidence, that it be more probable than any other inference which could be drawn from the facts thus proven. But when an inference of the probability of the ultimate fact must be drawn from facts whose existence is itself based only on an inference or a chain of inferences, it will be found that the Courts have, with very few exceptions, held in substance, although usually not in terms, that all prior links in the chain of inferences must be shown with the same certainty as is required in criminal cases, in order to support a final inference of the probability of the ultimate fact in issue.”

It has been held that doing an act which in fact furthers the objects of a conspiracy will not support a finding of knowledge of the conspiracy on the part of the actor. No inference may be drawn merely from the fact that plaintiffs were cut off.

United States v. Falcone, supra.

“ . . . the refusal of the supplier defendants to sell to the plaintiffs may have furthered the object of the conspiracy charged, but it did not prove that the suppliers knew of the conspiracy.”

Johnson v. J. H. Yost Lumber Co., supra, 117 F. 2d at 62.

Further, there must be *substantial* evidence tending to show every material fact before the jury may be permitted to find for plaintiff; a mere scintilla of evidence is not enough.

Carew v. R. K. O. Radio Pictures, 43 F. Supp. 199, 200 (S. D., Cal. 1942);

De Zon v. American President Lines, 129 F. 2d 404, 407 (9th Cir., 1942), *affirmed*, 318 U. S. 660, 63 S. Ct. 814 (1943);

Galloway v. United States, supra (130 F. 2d);

United States v. Holland, supra.

“ . . . the essential requirement is that *mere speculation* be not allowed to do duty for probative facts, after making due allowance for all *reasonably* possible inferences favoring the party whose case is attacked.” (Emphasis added.)

Galloway v. United States, 319 U. S. 372, 395, 63 S. Ct. 1077, 1089 (1943).

On the basis of the facts as to which there is testimony of any kind (even accepting all the testimony favorable to plaintiffs as true), it is no more probable that Flintkote knew of the existence of a conspiracy than that it did not, and, in fact, it would seem more probable that it did not. If the facts will not support an inference of knowledge of the conspiracy, it is impossible that they could support an inference of "knowing participation" in that conspiracy.

A mere showing of knowledge by Flintkote of the existence of a conspiracy among the contractors will not sustain plaintiffs' burden in this case. There must also be proof that Flintkote "knowingly participated" in the conspiracy, *i. e.*, that Flintkote was motivated by its knowledge of the conspiracy when it did the act which promoted the objects and purposes of the conspiracy.

"We agree with defendants that the most important issue in this case was their motive in cancelling the Emich franchise. Certainly before plaintiffs could recover treble damages for the alleged wrongful cancellation they had to establish that such cancellation was pursuant to a conspiracy . . . And if defendants could show that they cancelled the dealerships for any other reason than Emich's failure or refusal to use GMAC, then the cancellations could not be said to be in furtherance of the illegal conspiracy."

Emich Motor Corp. v. General Motors Corp., 181 F. 2d 70, 78 (7th Cir., 1950), *reversed in part* on other grounds, 340 U. S. 558, 71 S. Ct. 408 (1951).

Obviously enough, if knowledge were *proved*, one could reasonably infer from the facts of knowledge of the conspiracy and the cut-off that Flintkote knowingly participated in the conspiracy when it cut off plaintiffs. How-

ever, that inference is not inescapable, and it is a further inference from the fact of knowledge. If knowledge can be found only at the end of a long and weak chain of inferences from the facts as to which there is testimony then those facts will not support the further inference that Flintkote was motivated by such knowledge when it cut off plaintiffs.

“The crucial question is whether [Flintkote’s] conduct toward [plaintiffs] stemmed from independent decision or from an agreement, tacit or express.”

Theatre Enterprises v. Paramount Film D. Corp.,
346 U. S. 537, 540, 74 S. Ct. 257, 259 (1954).

“A conspiracy is ‘a combination of two or more persons, by concerted action, to accomplish a criminal or unlawful purpose, or some purpose not in itself criminal or unlawful, ‘by criminal or unlawful means.’ [citing cases.] It is a partnership in criminal purposes. The gist of the crime is the confederation or combination of minds.”

Marino v. United States, supra, 91 F. 2d at 693-94.

“ . . . an accused must join in the agreement to be guilty of a violation of the statute, for even if he commits an overt act, he does not violate the statute unless he joined in the agreement.”

Id. at 695.

The ultimate fact which is determinative of Flintkote’s liability in this case is whether there was a “confederation of minds” among Flintkote and the contractors. The issue is the subjective intent of Flintkote (through its agents) in cutting off plaintiffs. Obviously, absent some kind of confession, Flintkote’s intent would have to be proved, if at all, by inference from objective facts. In

this case, however, although all of the testimony (in the light most favorable to plaintiffs) is consistent with an intention on Flintkote's part to join the contractors' conspiracy, it is at least equally consistent with the inference that Flintkote had some other intention or motive in cutting off plaintiffs and did not intend to join any contractors' conspiracy; and all of the direct evidence is that Flintkote acted independently, pursuant to its own business judgment, and without participation in any conspiracy, combination or agreement.

It should be apparent, then, that there is no evidence in the record from which the jury could be permitted to find that Flintkote participated in any conspiracy or did any act in violation of the antitrust laws.

We make the foregoing contentions assuming that the testimony of Lysfjord and Waldron regarding certain alleged declarations by Ragland remains in the record. That testimony is discussed and the reasons for its inadmissibility are set forth at length in a later section of this brief, and reference is respectfully made thereto in this connection. If that testimony is excluded, as it should be, it is even more apparent that there is nothing in the evidence which will justify the jury's verdict against Flintkote.

It follows, then, that the court erred in denying Flintkote's motions for directed verdict at the close of plaintiffs' case and at the close of all the evidence and in denying Flintkote's motion to set aside the verdict and enter judgment for defendant. This Court should reverse the judgment and issue its mandate to the trial court to set aside the verdict and enter judgment for defendant Flintkote.

II.

**In Any Event, the Judgment Should Be Reversed and
a New Trial Ordered.**

Even if this Court does not agree with us that judgment should be entered for defendant, we believe it can be shown that substantial and prejudicial errors were committed by the trial court which call for a reversal and new trial.

We shall first discuss two major errors in connection with the admission of evidence.

**A. Prejudicial Error Was Committed
in Admitting Evidence.**

**THE COURT ADMITTED EVIDENCE TENDING TO PROVE
A CONSPIRACY BETWEEN CERTAIN CONTRACTORS
WITHOUT SHOWING FLINTKOTE'S CONNECTION
WITH THE ALLEGED CONSPIRACY.**

(Specification of Error No. 2, p. 11.)

Over defendant's objection the Court admitted evidence concerning the activities of some of the acoustical tile contractors, former defendants in the case, particularly the R. W. Downer Company, by whom plaintiffs were employed before they started their own business. This testimony had to do with the following matters, among others: certain meetings of some of the contractors, at which it is not even suggested that any Flintkote representative was present (*e.g.*, R. 302 ff.); a long series of documents consisting of so-called "take off sheets" (Exs. 18 through 37), with which Flintkote had no connection whatever; and discussions of business practices of certain employees and officials in the Downer company (*e.g.*, R. 314-315) of which Flintkote was not shown to have had any knowledge. This testimony indicated that the

Downer company often learned in some manner what the low bid was going to be on a public job and purposely put in a higher bid (*e. g.*, R. 317), presumably subject to some arrangement for allocating those public jobs among the various contractors.

Flintkote is, of course, a manufacturer of tile. It does not do any installation work and would not in any way be presumptively charged with knowledge of the practices and business methods of contractors.

The general effect of this testimony was such that one might infer from it that at least some of the contractors had evolved a plan for refraining from competitive bidding and for rotating jobs in certain public projects in the Los Angeles area among themselves.

To this testimony defendant objected and argued at length that it was all hearsay as to Flintkote and that before evidence of the acts and declarations of alleged co-conspirators could be received, the connection of the defendant with the conspiracy must first be established. (R. 278-94.)

This is, of course, the elementary and well-settled rule on which point no useful purpose would be served by elaborate discussion. The rule is succinctly stated in *Thomas v. United States*, 57 F. 2d 1039, 1041 (10th Cir., 1932):

“To render evidence of the acts or declarations of an alleged conspirator admissible against an alleged co-conspirator, the existence of the conspiracy must be shown and the connection of the latter therewith established. [citing cases.]

“Declarations made by one conspirator to another are not competent evidence to establish the connection of a third person with the conspiracy. [citing cases.]

“The existence of the conspiracy charged cannot be established against an alleged conspirator by evidence of the acts or declarations of his alleged co-conspirator done or made in his absence. [citing cases.]”

In some instances where there are a great many defendants and a large number of alleged conspiratorial acts, particularly if the case is before the court rather than jury, as a matter of practical expedience, evidence of this sort involving one or more of the defendants is sometimes admitted, subject to motion to strike, before a connection is shown with other defendants, but in so doing the courts recognize that this is a departure from the normal order of proof. See, *e. g.*,

United States v. Morgan, 11 F. R. D. 445, 454 (S. D. N. Y., 1951).

But at this trial defendant pointed out that this was a jury case; that there was but one defendant; that there was no reason to depart from the normal order of proof; and that by so doing, serious prejudice might be done to Flintkote if the necessary connection were not proved (*e. g.*, R. 285-86).

The court nevertheless proceeded to admit the evidence, subject to motion to strike.

Several court days were taken up with this testimony, and when the motion to strike was made, the court denied it.

The trial court should have sustained defendant's objection and should have required plaintiffs to prove the connection, if any, with Flintkote before admitting evidence of the acts and declarations of the contractors and

their employees. We think it clear that no connection between the contractors and defendant *was* proved, and that defendant's motion to strike should have been granted. As we have argued above, the motion for directed verdict was also improperly denied.

But even if there were some tenuous conflicting evidence of a connection between the contractors' practices and Flintkote, which we deny, the court should have required the presentation of that evidence first, so that the matter could be viewed in its proper perspective. Allowing this evidence of the activities of the contractors to be presented over repeated objections, might well have caused the jury to conclude that its mere presentation was some evidence of Flintkote's participation in a conspiracy.

It is idle to suggest that this highly inflammatory testimony did no damage to Flintkote because it was admitted only subject to motion to strike. In the case of *Krulewitch v. United States*, 336 U. S. 440, 453, 69 S. Ct. 716, 723 (1949), Mr. Justice Jackson stated, in his concurring opinion:

"Strictly, the prosecution should first establish *prima facie* the conspiracy and identify the conspirators, after which evidence of acts and declarations of each in the course of its execution are admissible against all. But the order of proof of so sprawling a charge is difficult for a judge to control. As a practical matter, the accused often is confronted with a hodgepodge of acts and statements by others which he may never have authorized or intended or even known about, but which help to persuade the jury of existence of the conspiracy itself. *In other words, a conspiracy often is proved by evidence that is ad-*

missible only upon assumption that conspiracy existed. The naive assumption that prejudicial effects can be overcome by instructions to the jury, Cf. Blumenthal v. United States, 332 U. S. 535, 559, 68 S. Ct. 248, 257, all practicing lawyers know to be unmitigated fiction. See Skidmore v. Baltimore & Ohio R. Co., 2 Cir., 167 F. 2d 54.” (Emphasis ours.)

The admission of this evidence was highly prejudicial and prevented a fair trial of the issues. Despite the fact that the contractors were no longer in the case, by adopting this procedure the court in effect treated Flintkote as a co-defendant with the contractors. Again quoting Mr. Justice Jackson in the opinion referred to above:

“A co-defendant in a conspiracy trial occupies an uneasy seat. There generally will be evidence of wrongdoing by somebody. It is difficult for the individual to make his own case stand on its own merits in the minds of jurors who are ready to believe that birds of a feather are flocked together.” (336 U. S. at 454, 69 S. Ct. at 723.)

This case in effect was tried against Downer and some of the other contractors. These were the people who had already paid plaintiffs \$20,000.00 in exchange for a dismissal. (Evidence of that fact, however, was withdrawn from the jury by stipulation.) The jury’s indignation against the contractors was apparently aroused and the jury proceeded to punish Flintkote for *their* conduct.

2. THE COURT IMPROPERLY ADMITTED HEARSAY TESTIMONY OF ALLEGED DECLARATIONS OF A SUBORDINATE EMPLOYEE OF DEFENDANT.

(Specifications of Error Nos. 3 and 4,
pp. 11-13 and 13-20.)

In this section, we shall discuss the trial court's plain error in admitting the testimony of the plaintiffs Waldron and Lysfjord respecting certain alleged declarations by Robert Ragland and in failing to strike that testimony from the record. The testimony and the objections urged at the trial are set out in full in the specifications of errors referred to above and need not be repeated here.

In order to set these matters in their proper perspective, it should be noted that neither Lysfjord's nor Waldron's testimony about Ragland's alleged declarations was supported by any foundation respecting (1) the purpose of Ragland's alleged visit to plaintiffs' place of business when the declarations were made, (2) any other matters which may have been discussed or handled at the meetings when the declarations were made (or meeting, as the case may be), (3) the scope of Ragland's authority (either actual or ostensible) with respect to (1) and (2) or the declarations. It is defendant's contention that, on the foundation laid (even considering all other evidence in the case, without regard to time of introduction), the testimony of plaintiffs respecting the alleged declarations of Ragland was hearsay; did not relate to a party's admission; was not regarding a declaration of a co-conspirator in furtherance of the conspiracy; was not regarding an overt act in furtherance of the conspiracy; was not regarding an act within any concept of "*res gestae*"; was not within any exception to the hearsay rule; and was therefore inadmissible. We shall discuss these contentions in order:

(a) *The Testimony Was Hearsay.*

On its face the testimony objected to comes within the classical definition of hearsay. It is a recital by a witness of an out-of-court declaration of a third party used to establish the truth of the matter asserted in the declaration.

“The Hearsay rule points out that B’s [Ragland’s] assertion, offered testimonially, is not made on the stand and presently, but out of court anteriorly, and challenges it upon that ground. The Hearsay rule tells us that B’s assertion (even assuming B to have been qualified, by knowledge and otherwise, as witness) cannot be accepted because it has not been made at a time and place where it could be subjected to certain essential tests or investigations calculated to demonstrate its real value by exposing such latent sources of error. The Hearsay rule predicates a contrast between assertions untested and assertions tested; it insists upon having the latter.” (V Wigmore, *op. cit. supra*, §1361, p. 3.)

In other words:

“What we are here concerned with is . . . [the] notion . . . that *when a specific person, not as yet in court, is reported to have made assertions about a fact, that person must be called to the stand [to testify to the fact sought to be proved], or his assertion will not be taken as evidence.*” (*Id.* at §1364, p. 10) (emphasis is Wigmore’s.)

(b) *The Testimony Did Not Relate to a Party’s Admission.*

Ragland’s alleged declarations are not removed from the operation of the hearsay rule on any theory that they were admissions of a party, because those alleged declarations of Ragland did not constitute admissions of defendant Flintkote.

For the out-of-court declarations of an agent to be admissible against his principal, the declarations must be within the scope of the authority conferred upon that agent and made while in the exercise of his authority.

IV Wigmore, *op. cit.*, *supra*, §1078, pp. 119-120;
2 Fletcher, *Cyclopedia Corporations*, §733, p. 999
(Perm. ed. 1954).

And before it can be said that such statements are made "while in the exercise of his authority," it must appear that they were made in the course of a transaction then being executed for the principal.

IV Wigmore, *op. cit.*, *supra*, §1078, pp. 119-120;
2 Fletcher, *op. cit.*, *supra*, §733, p. 999;

See, Paramount Productions v. Smith, 91 F. 2d
863, 865-866 (9th Cir.), *cert. denied*, 302 U. S.
749, 58 S. Ct. 266 (1937).

We are dealing here with the claimed admissions of a subordinate employee of a corporation. Fletcher, quoting with approval from the language of two Michigan cases, has this to say about the declarations of such agents:

"The declarations and admissions of subordinate corporate agents are binding upon a corporation only when made in connection with the particular business intrusted to them and such declarations must be incidental to the duties which they are intrusted to perform.' 'Were the rule otherwise, the fortune of every man would rest on the veracity of his errand boy.'" (2 Fletcher, *op. cit.*, *supra*, §747, pp. 1049-1050.)

There is no evidence that Mr. Ragland was a general representative of defendant. Indeed, the record affirmatively discloses the contrary. Mr. Ragland was at most

a lower echelon salesman with no authority to determine whether or not to sell acoustical tile to plaintiffs on a direct basis or any basis, either at the outset or in connection with the cut-off. All of the testimony is to the effect that Mr. Ragland was a mere subordinate corporate agent of The Flintkote Company. There is absolutely nothing in the record to indicate that he had authority, express or implied, to make the declarations here involved.

There is not a shred of evidence that Mr. Ragland, at the time of the alleged declarations, was engaged in any transaction on behalf of defendant. Lysfjord testified only that "Mr. Ragland came into the office, met me at the office" (R. 474). Waldron testified only that "At our office. Mr. Ragland came in and was telling us about—" (R. 258) "He was telling us that Mr. Gus Crouse—" (R. 259). Neither Lysfjord nor Waldron related a single business transaction which occurred at those meetings (or at that meeting) with Mr. Ragland. It does not appear that Mr. Ragland had any mission at all to perform on behalf of his principal, The Flintkote Company, on either (or that) occasion. The record shows only that in each (or that) case Mr. Ragland appeared at the Bell office, made the alleged statements, and (presumably) left. Thus on plaintiffs' testimony, to hold that the alleged declarations of Ragland were admissions of Flintkote would be a striking case of resting the fortune of the principal, The Flintkote Company, on the veracity of its "errand boy."

Since there was no evidence either that Mr. Ragland had authority to make the declarations in question or that he was engaged in a transaction on behalf of defendant at the time they were made, the conclusion is

inescapable that plaintiffs wholly failed to lay an adequate foundation upon which to premise the admission of the challenged testimony as constituting admissions of Mr. Ragland's principal, The Flintkote Company.

Furthermore, the declarations, as related by plaintiffs, were pure narrative, entirely historical in character. It is beyond dispute that the declarations of an agent which are merely narrative of a past transaction, that is, historical in nature, and which have no connection with any transaction then being conducted by the agent with authority for his principal, are not considered as being made in the course of such a transaction, and therefore, do not constitute admissions properly chargeable to the principal.

2 Fletcher, *op. cit.*, *supra*, §735, pp. 1015-16.

It is thus apparent that the declarations here under discussion were neither expressly authorized nor made in the course of and as a part of a transaction within the scope of Ragland's authority in which he was then engaged; and the declarations were all purely historical. They did not constitute admissions of Flintkote.¹

¹In further support of this proposition, see:

Mutual Sav. Life Ins. Co. v. Hall, 49 So. 2d 298, 300 (Ala. 1950);

Decker v. Consolidated Feed, Coal & Lumber Co., 137 N. J. L. 154, 59 A. 2d 15, 16 (1948);

Hansen v. Eagle-Picher Lead Co., 8 N. J. 133, 84 A. 2d 281, 286-287 (1951);

Merchants' Nat. Bank of Gardner v. Clark, 139 N. Y. 314, 34 N. E. 910 (1893);

State Bank of Brocton v. Brocton Fruit Juice Co., 208 N. Y. 492, 102 N. E. 591, 592 (1913);

Shelton v. Wolf Cheese Co., 93 S. W. 2d 947, 952 (Mo. 1936);

Southern Surety Co. v. Nalle & Co., 242 S. W. 197 (Comm. of Appeal of Texas 1922).

(c) *The Testimony Was Not Admissible as Relating to
Declarations of a Co-conspirator.*

The court apparently admitted the testimony of Waldron respecting the Ragland declarations appearing at pages 259, 261-63, 266 and 269-70 of the Record on the theory that Ragland was a co-conspirator with Flintkote and that his declarations in the course of and in furtherance of the conspiracy bound Flintkote. See the remarks of the court appearing at pages 259-60 of the Record. That theory cannot be applied to these alleged declarations.

It is well settled that a conspiracy cannot exist between a corporation and its employee or agent acting as such.

Nelson Radio & Supply Co. v. Motorola, 200 F. 2d 911 (5th Cir. 1952), *cert. denied*, 345 U. S. 925, 73 S. Ct. 783 (1953).

There is no evidence in the record tending to indicate that Ragland's relationship to Flintkote was ever anything other than that of an employee.

There is no evidence that Mr. Ragland conspired with any of the acoustical contractors in his individual capacity. Obviously, then, his acts and declarations cannot be admitted as acts or declarations of a conspirator.

Even if on some unexplained theory Mr. Ragland could be considered as a co-conspirator with the contractors and Flintkote, his acts and declarations are not admissible to bind Flintkote until such time as Flintkote's participation is shown by independent acts or declarations, *i.e.*, other than the acts or declarations of co-conspirators.

United States v. Schneiderman, 106 F. Supp. 892, 903 (S. D. Cal. 1952).

Even if these difficulties were surmounted, the testimony would still be inadmissible. The declarations, stand-

ing alone and not as a part of any transaction, there being no evidence connecting them with any transaction, in no way furthered the objects of the alleged conspiracy. Webster's New International Dictionary, Second Edition, defines "furtherance" as:

"Act of furthering, or helping forward; promotion; advancement; progress." (p. 1022.)

Substantially the same meaning was given the phrase in *People v. Smith*, 151 Cal. 619, 626, 91 Pac. 511, 513 (1907),

a prosecution for murder, where the court defined it as follows:

"A declaration, statement, or act of a conspirator, to be admissible as in 'furtherance' of the conspiracy, must, as the word 'furtherance,' *ex vi termini*, imports, be an act, statement, or declaration which in some measure, or to some extent, aids or assists towards the consummation of the object of the conspiracy."

Manifestly, as a matter of law it cannot reasonably be said that the statements themselves were in furtherance of the conspiracy. On the contrary it would seem that revealing the conspiracy to the intended victims would tend to frustrate its objective.

Moreover, it has frequently been said that mere narrative declarations by co-conspirators are not competent for the reason that they are not ordinarily in furtherance of a conspiracy.

Logan v. United States, 144 U. S. 263, 12 S. Ct. 617, 632 (1892);

Mayola v. United States, 71 F. 2d 65, 67 (9th Cir. 1934);

United States v. Food and Grocery Bureau of So. Cal., 43 F. Supp. 966, 970 (S. D. Cal., 1942).

As has already been pointed out, these declarations are pure narrative, entirely historical in character. Therefore, their utterance by Mr. Ragland could not in any sense have furthered the alleged conspiracy.

(d) *The Testimony Was Not Admissible as Describing Overt Acts in Furtherance of the Conspiracy.*

The court suggested at the time that Lysfjord's testimony was allowed in evidence that Ragland's declarations were an overt act in furtherance of the conspiracy (R. 471) (apparently, although not expressly, concluding that they were thus not hearsay or were within some exception to the hearsay rule). What has just been said with respect to the admission of Waldron's testimony on the theory that Ragland's declarations constituted admissions of a co-conspirator and were thus binding upon Flintkote is applicable here. Ragland was not a co-conspirator with Flintkote. Even if on some theory he had been a co-conspirator with the contractors, his alleged declarations could not be admitted against Flintkote because no participation by Flintkote in the contractors' conspiracy was independently proved. In any event, the act of reciting to the victims of a conspiracy an historical account of the activities of the alleged conspirators could hardly be characterized as an overt act in furtherance of the conspiracy.

(e) *The Testimony Is Not Admissible as Describing Part of the Res Gestae.*

The court also suggested at the time that Lysfjord's testimony was allowed in evidence that Ragland's alleged declarations were a part of the *res gestae* of the alleged conspiracy itself (R. 476) (again apparently concluding that the hearsay rule did not bar their admission). But that testimony was not admissible on any such theory.

Defendant has been unable to find any reference in either antitrust cases or general conspiracy cases where reliance was placed upon the proposition that a conspiracy viewed as a whole has a *res gestae*. The term "*res gestae*" is not so elastic. It is not a catch-all device to permit the reception of evidence otherwise clearly inadmissible. Black's Law Dictionary, Third Edition, defines the term as follows:

"Things done; transactions; essential circumstances surrounding the subject. The circumstances, facts, and declarations which grow out of the main fact, are contemporaneous with it, and serve to illustrate its character." (p. 1539.)

In

St. Clair v. United States, 154 U. S. 134, 14 S. Ct. 1002 (1894),

the court quoted with approval from Wharton on Evidence as follows:

"The '*res gestae*,' ' Wharton said, 'may be, therefore, defined as those circumstances which are the undesigned incidents of a *particular* litigated *act*, and which are admissible when illustrative of such *act*.' (14 S. Ct. at 1008; emphasis added.)

The meaning of "*res gestae*" was fairly put by the court in

People v. Perkins, 8 Cal. 2d 502, 66 P. 2d 631 (1937),

when it said:

"[W]here it is the event speaking through the person and not the person telling about the event, . . . such declarations are part of the *res gestae* and admissible in evidence." (8 Cal. 2d at 514, 66 P. 2d at 636-37.)

It cannot be said that a conspiracy is an event or an act. Certain conduct, either acts or declarations, it is true, may be said to be in furtherance of a conspiracy, and declarations at the time of the acts may constitute a part of the *res gestae* of that particular act, but a narrative declaration as to past events, standing alone, illustrates nothing. There is no suggestion here that Ragland's alleged declarations were spontaneous exclamations contemporaneous with a conspiratorial act. It clearly is a case of a person telling about a past event, rather than an event speaking, in part, through a person's declarations. It follows that the declarations by Mr. Ragland may not find their way into evidence under the guise of the "*res gestae*" of conspiracy.

From all of this, we submit that the testimony was pure hearsay and clearly inadmissible.

(f) *The Erroneous Admission of This Testimony Was Highly Prejudicial.*

The testimony regarding the alleged Ragland declarations was prejudicial to Flintkote for all of the following reasons, among others: (1) It brought before the jury evidence of at least two contacts between Flintkote and the contractors which were not otherwise adverted to in the evidence, one of which was an alleged general meeting suggesting concerted action; (2) It being Flintkote's position that the declarations were not made, it was necessary that Ragland deny making the same, and this may have given them unwarranted importance in the jury's mind; (3) It being Flintkote's position that the events described in the alleged declarations did not occur, it was necessary that the occurrence of the supposed events be denied, and having each person who was supposed to

be involved in the events deny the same may have given the testimony unwarranted significance in the minds of the jurors; (4) The admission of these declarations, over repeated and extended objection, may well have given the declarations unusual probative value with the jury; (5) The admission of the declarations tended to obscure the issues in the case and might, if not properly analyzed, have led the jury astray in its reasoning; (6) The alleged actions of the contractors as related in the declarations would tend to inflame the jurors against the contractors, and cause the jury to sweep Flintkote along with the contractors.

Obviously, then, the admission into evidence of the aforesaid testimony was error, and that error was both substantial and prejudicial. The error was grave enough that it, standing alone, warrants a reversal of the judgment and a new trial in this action.

B. The Court Erred in Its Instructions to the Jury.

Defendant believes that the instructions given by the trial court were erroneous in at least five particulars. We shall discuss these contentions under separate headings.

1. THE COURT FAILED ADEQUATELY TO INSTRUCT THE JURY THAT FLINTKOTE WAS THE ONLY DEFENDANT AND THAT ITS PARTICIPATION IN AN UNLAWFUL CONSPIRACY WAS A PREREQUISITE FOR A VERDICT FOR PLAINTIFFS.

(Specification of Error No. 5, pp. 20-23.)

The court erred in failing adequately to instruct the jury that it could return a verdict for plaintiffs only if it found that defendant Flintkote was a party to an unlaw-

ful conspiracy in restraint of interstate commerce which injured plaintiffs and in failing adequately to instruct the jury that defendant Flintkote was the only defendant in the case.

On several occasions, the court in its instructions referred to "defendants." Such reference to "defendants" was wholly misleading, since there was but one defendant in the case: The Flintkote Company. The action, as has been shown, was originally brought against the acoustical tile contractors and various individual defendants as well as Flintkote (R. 3), but the contractors made a settlement with plaintiffs, and the action had been dismissed as against all defendants other than Flintkote before the trial commenced (R. 95-103, 113-14). Numerous references to "defendants" could have no effect other than to confuse the jury as to whom this action was really against, whose conduct was under investigation, whose conduct must supply the basis for the verdict, and who would have to pay any damages which the jury might assess. Admittedly, the court said at R. 1239, "but there is only one defendant here. . . . We are trying the case here today as to this one defendant." The court also correctly instructed the jury in the second complete paragraph of R. 1246, the first full paragraph of R. 1247, and the first full paragraph of R. 1252 that Flintkote's participation in an unlawful conspiracy was prerequisite to a verdict for plaintiffs. However, the repeated references to "defendants" inevitably created confusion; they may well have given the jury the impression that some defendants other than Flintkote were in some way still involved in the case and that a verdict for plaintiffs could be based on the activities of those "defendants" without Flintkote's participation therein.

Several of the instructions, however, require specific discussion of errors in this connection in addition to the references to “defendants” contained therein. At R. 1236, the court correctly stated the general rule that Flintkote could refuse to deal with plaintiffs for any cause or for no cause whatever, but the court went on to qualify that rule incorrectly by stating: “But under the antitrust laws it cannot do so if there has been a conspiracy.” That qualification was erroneous for several reasons and resulted in the entire statement being erroneous. The charge indicated that Flintkote’s refusal to deal with plaintiffs might be unlawful if there had ever been any conspiracy, without regard to the legality or subject matter thereof or Flintkote’s participation therein. It ignored completely the element of Flintkote’s motive in refusing to sell to plaintiffs. Flintkote can be liable for refusing to sell to plaintiffs only if that refusal was the result of *knowing participation* by Flintkote in an *unlawful conspiracy*. (See discussion and authorities cited at pp. 48-50, 53, 58-59, *supra*.) Any charge which would permit the jury to find liability of Flintkote on any lesser showing is necessarily erroneous and prejudicial.

At R. 1245, the court flatly stated that the jury may bring in a verdict against someone other than Flintkote, saying: “your verdict should be in favor of the plaintiffs as to each defendant whom you find to have knowingly participated therein.” That statement was manifestly erroneous. Flintkote was the only party defendant, and any verdict for plaintiffs necessarily had to be against Flintkote and no one else. The instruction ignores the essential element of any verdict for plaintiffs: that the

jury find that Flintkote had participated in the unlawful conspiracy.

At R. 1250, the court again instructed the jury in substance that it could return a verdict for plaintiffs without finding that Flintkote participated in any unlawful conspiracy, saying: “. . . if you find that Mr. Ackerson was right in his arguments here, and the evidence does show that there was a conspiracy, . . . Your duty . . . will be to compensate the plaintiffs for the loss which they have sustained.” That suggestion to the jury that it take the opportunity presented to it to compensate plaintiffs for any loss sustained by them without regard to any liability on Flintkote’s part for the creation of the loss is plainly wrong.

The most flagrantly erroneous and prejudicial of the individual instructions of the court in this category is found at R. 1245: “If you are satisfied from all the evidence that any two or more of the defendants acted together for the purpose and with the effect of eliminating the competition in the purchase, sale or installation of acoustical tile, then you may return a verdict against the defendants and in favor of the plaintiffs, . . .” That particular instruction is erroneous for several reasons and is discussed further, *infra*. It disregards the necessity of knowing participation by Flintkote in a combination or conspiracy as a prerequisite to a verdict for plaintiffs. On the contrary, the jury is permitted to return a verdict for plaintiffs (which must necessarily be against Flintkote) upon a showing that *any* two or more of the “*defendants*” (not necessarily Flintkote) acted together. This disregards the law and Flintkote’s rights.

The error in the respects above noted is not cured by the fact that the court in another part of the charge gave correct instructions respecting the necessity for a finding of Flintkote's participation in a conspiracy as a prerequisite to a verdict for plaintiffs.

"These instructions were conflicting and therefore erroneous."

Voss v. Becko, 192 F. 2d 827, 830 (8th Cir. 1951).

In *Paramount Film Distributing Corp. v. Applebaum*, 217 F. 2d 101 (5th Cir. 1954), *cert. denied*, 349 U. S. 961, 75 S. Ct. 892 (1955), the court had before it three instructions which were incorrect in stating as a matter of law that a distributor of motion pictures must accept all equally suitable exhibitors as customers and must treat them all equally; the trial court had also given four correct instructions which repeatedly and correctly stated that no duty rested on the defendants to license plaintiffs if they acted independently and their refusal to license was not the result of an illegal conspiracy. In response to the contention that the correct instructions cured any error in the incorrect instructions, the court stated, at page 125 of 217 F. 2d:

"[W]e cannot agree that their presentation made it clear that they superceded the three erroneous instructions previously given. The record reflects no reference, direct or otherwise, to the three erroneous instructions, anywhere in the entire charge. There is nothing from which the jurors would necessarily conclude that the judge was qualifying or otherwise correcting the misconception which obviously resulted from the previous erroneous instructions. The propositions presented are some forty pages apart in the printed record and are completely contradictory in

substance. Rather than cure or clarify the error in the three previous instructions, the giving of the four instructions requested by appellants must have resulted in additional confusion in the minds of the jurors. *Certainly it cannot be said as a matter of law that the giving of later contradictory charges correctly stating the law necessarily cures previous erroneous instructions.* Where the error is so fundamental as that in the three instructions given upon appellees' request, *it must appear that later instructions or the charge as a whole so clearly obliterated the error as to render it reasonably certain that no prejudice resulted.* The four correct instructions given at appellants' request cannot be said to have had that effect." (Emphasis added.)

The court went on to state, at page 125 of 217 F. 2d:

" . . . we reluctantly conclude that the charge as a whole was most confusing and did not clarify or remove the prejudicial effect of the erroneous instructions."

The remarks of Judge Dawkins quoted above are pertinent to the case at bar. Here there were seven instructions which were incorrect in the particulars here under discussion (four of them grossly and prejudicially incorrect) and four correct instructions. The record in this case "reflects no reference, direct or otherwise, to the . . . erroneous instructions, anywhere in the entire charge." The propositions are rather widely separated in the instructions (though not so widely as in the *Paramount* case) and are "completely contradictory in substance." It is submitted that the correct instructions "resulted in additional confusion in the minds of the jurors" rather than curing or clarifying the error in the erroneous instructions. In the *Paramount* case, the in-

structions complained of stated as a matter of law that certain conduct of the defendants was unlawful without any finding of unlawful conspiracy. In this case, the instructions complained of in this section stated that the jury could bring in a verdict for plaintiffs without any finding that *Flintkote* (as opposed to “defendants”) knowingly participated in an unlawful conspiracy. The prejudicial effect of those erroneous instructions was in no way removed or diminished by the correct instructions.

2. THE COURT FAILED TO GIVE PROPER INSTRUCTIONS REGARDING REASONABILITY OF RESTRAINTS OF TRADE.

(Specification of Error No. 6, pp. 23-27.)

The court erred in instructing the jury that the reasonability or unreasonability of any restraint of trade which the jury might find was unimportant and in failing to instruct the jury that only unreasonable restraints of trade are prohibited by the law and that the reasonability of any restraint found by the jury was a question for the jury to decide.

It is well established that merely because a contract, combination or concert results in a restraint of trade or commerce, it does not follow automatically that it is of an unlawful nature; only unreasonable restraints of trade or commerce are prohibited. That principle was first definitively announced by the Supreme Court in

Standard Oil Co. v. United States, 221 U. S. 1, 31 S. Ct. 502 (1911),

where the court said, at page 517 of 31 S. Ct.:

“The merely generic enumeration which the statute makes of the acts to which it refers, and the absence of any definition of restraint of trade as used in the

statute, leaves room for but one conclusion, which is, that it was expressly designed not to unduly limit the application of the act by precise definition, but, while clearly fixing a standard, that is, by defining the ulterior boundaries which could not be transgressed with impunity, to leave it to be determined by the light of reason, guided by the principles of law and the duty to apply and enforce the public policy embodied in the statute, in every given case whether any particular act or contract was within the contemplation of the statute.”

The requirement that the restraint be unreasonable to be unlawful has been applied consistently in the later cases.

“. . . the legality of an agreement or regulation cannot be determined by so simple a test, as whether it restrains competition. Every agreement concerning trade, every regulation of trade, restrains. To bind, to restrain, is of their very essence. The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition. To determine that question the court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts. This is not because a good intention will save an otherwise objectionable regulation or the reverse; but because knowledge of intent may help the court to interpret facts and to predict consequences. . . . the evidence admitted makes it clear that the rule

was a reasonable regulation of business consistent with the provisions of the Anti-Trust Law.”

Board of Trade of City of Chicago v. United States, 246 U. S. 231, 38 S. Ct. 242, 244 (1918).

See also:

United States v. Bausch & Lomb Optical Co., 321 U. S. 707, 64 S. Ct. 805, 816 (1944);

Sugar Institute v. United States, 297 U. S. 553, 597-600, 65 S. Ct. 629, 641-43 (1936);

Associated Press v. United States, 326 U. S. 1, 14-15, 65 S. Ct. 1416, 1422 (1945);

Paramount Film Distributing Corp. v. Village Theatre, 228 F. 2d 721, 726 (10th Cir., 1955).

In none of the instructions of the court quoted in Specification No. 6, above, was the requirement that the restraint be unreasonably adverted to in any way. Flintkote does not contend that it would be improper for the court to instruct the jury that certain restraints of trade are illegal *per se*, and that if restraints of that category were found, the jury need not concern itself further with the matter of reasonability. Flintkote does contend, however, that the requirement of unreasonability of the restraint as a prerequisite to liability was not properly reflected in the charge of the court as given and that the Court's failure to submit an essential question of fact to the jury was error.

3. THE COURT FAILED TO GIVE ADEQUATE INSTRUCTIONS AS TO THE NECESSITY FOR SHOWING PUBLIC INJURY.

(Specification of Error No. 7, pp. 27-28.)

The court erred in giving the jury conflicting instructions regarding the necessity of a finding of injury to the

public as a prerequisite to a verdict for plaintiffs. That such a finding is prerequisite to a verdict for plaintiffs and that the law was correctly stated in Flintkote's proposed instructions numbers 30-32 (reproduced at pages 27 to 28, *supra*) is established by the following cases:

Shotkin v. General Electric Co., 171 F. 2d 236 (10th Cir., 1948);

Feddersen Motors v. Ward, 180 F. 2d 519 (10th Cir., 1950);

Interborough News Co. v. Curtis Publishing Co., 127 F. Supp. 286, 301 (S. D., N. Y., 1954), *affirmed*, 225 F. 2d 289 (1955).

The trial court recognized the necessity for instructions of this character and in fact gave defendant's proposed instructions numbers 30 and 32 (R. 1249).

The court's error was in giving other conflicting instructions which would allow the jury to find for plaintiffs without first finding that the public had been injured. Those instructions are set forth at length in Specification of Error No. 6, *supra*.

"Certainly it cannot be said as a matter of law that the giving of later contradictory charges correctly stating the law necessarily cures previous erroneous instructions. Where the error is so fundamental . . . it must appear that later instructions or the charge as a whole so clearly obliterated the error as to render it reasonably certain that no prejudice resulted."

Paramount Film Distributing Corp. v. Applebaum, *supra*, 217 F. 2d at 125 (5th Cir., 1954).

In this case the court's correct instructions did not refer in any way to the prior erroneous instructions. There was no indication that the later instructions super-

seded or were intended to correct the prior instructions. It follows that the later instructions did not cure the prior erroneous instructions.

Flintkote was clearly prejudiced by the erroneous instructions since they advised the jury that it could bring in a verdict for plaintiffs without first finding that a fact indispensable to such a verdict existed.

4. THE COURT FAILED TO GIVE INSTRUCTIONS REQUESTED BY DEFENDANT SHOWING SPECIFIC APPLICATION OF DEFENDANT'S THEORY OF THE CASE.

(Specification of Error No. 8, pp. 28-29.)

The court erred in failing to present to the jury in its instructions any specific application of the law to defendant's theory of the facts either by way of giving the substance of defendant's requested instructions numbers 24, 25 and 33, or otherwise. Flintkote's defense of the action consisted principally of generally denying knowledge of or participation in any conspiracy in restraint of trade and offering the explanation of its conduct in refusing to deal with plaintiffs that plaintiffs had violated an express understanding that they would not do business in the Los Angeles area. Flintkote's entire defense by way of explanation of its conduct was embodied in instructions numbered 24 and 33. Defendant's requested instruction number 33 correctly stated that Flintkote's restricting the number of Flintkote acoustical tile contractors in the Los Angeles area was not inherently unlawful and would not be wrongful unless done for an unlawful purpose.

Bascom Launder Corp. v. Telccoin Corp., 204 F. 2d 331, 335 (2d Cir.), *cert. denied*, 345 U. S. 994, 73 S. Ct. 1133 (1953);

Brosious v. Pepsi-Cola Co., 155 F. 2d 99 (3d Cir., 1946);

Boro Hall Corporation v. General Motors Corporation, 124 F. 2d 822, 823 (2d. Cir.), and see opinion on denial of rehearing, 130 F. 2d 196, 197 (2d Cir., 1942), *cert. denied*, 317 U. S. 695, 63 S. Ct. 436 (1943);

United States v. Bausch & Lomb Optical Co., 45 F. Supp. 387, 398-399 (S. D. N. Y., 1942), *modified in non-pertinent respects, and, as modified, affirmed*, 321 U. S. 707, 64 S. Ct. 805 (1944);

United States v. Addyston Pipe & Steel Co., 85 Fed. 271, 287 (6th Cir., 1898), *modified and affirmed*, 175 U. S. 211, 20 S. Ct. 96 (1899).

Defendant's requested instruction number 24 stated that Flintkote could not be liable to plaintiffs if it refused to deal with them because they had invaded the trade territories of established Flintkote dealers contrary to a condition imposed by Flintkote and not because of an unlawful conspiracy. That instruction also constituted a correct statement of the law applicable to this case,

Johnson v. J. H. Yost Lumber Co., *supra*;

Interborough News Co. v. Curtis Publishing Co., *supra*,

and the testimony elicited in the course of the trial amply justified submitting an instruction based on a finding of the facts contained therein to the jury (see, *e.g.*, R. 1064-72).

Defendant's requested instruction number 25 stated the law correctly to the effect that refusing to deal with plaintiffs as the result of pressure by other persons would not constitute participation in an unlawful conspiracy and that knowledge of an unlawful conspiracy could not be

inferred solely from the fact that Flintkote succumbed to such pressure.

Johnson v. J. H. Yost Lumber Co., supra;

Interborough News Co. v. Curtis Publishing Co., supra.

The evidence amply warranted the giving of that instruction, for although Flintkote did not claim that its refusal was the result of pressure by the contractors, plaintiffs had averred to pressure from the contractors as the reason for Flintkote's action on several occasions (see, *e.g.*, R. 197, 257, 449, 488, 262-63, 270, 475, 476).

Flintkote was entitled to have the aforesaid three instructions (or their substantial equivalent) given to the jury, and the court's failure to do so constituted prejudicial error.

"It has long been the rule that, as against a mere general or abstract charge, a party is entitled to a specific instruction on his theory of the case, if there is evidence to support it and if a proper request for such an instruction is made."

Chicago & N. W. Ry. Co. v. Green, 164 F. 2d 55, 61 (8th Cir., 1947);

Montgomery v. Virginia Stage Lines, 191 F. 2d 770, 772 (D. C. Cir., 1951);

Accord, *Chicago, Rock Island & Pacific R. R. v. Lint*, 217 F. 2d 279, 285 (8th Cir., 1954).

In the present case, the court included in its instructions a rather lengthy and highly inflammatory extract from the First Amended Complaint (R. 1236-39). There was absolutely no evidence in the record to support many of the allegations so included in the court's charge. Flintkote was, under those circumstances, at least entitled to

have the court present to the jury a correct and specific statement of the law applicable to Flintkote's theory of the case, which theory found ample support in the evidence.

"In a proper case, a party may be entitled to have his theory submitted to the jury, when there is evidence to support it and a proper request therefor has been made. . . . However, such a charge should be judicial and not one-sided or argumentative; and when the judge instructs as to one party's theory, he should also instruct as to the other party's contentions. U. S. v. Messinger, 4 Cir., 68 F. 2d 234; State Automobile Mut. Ins. Co. v. York, 4 Cir., 104 F. 2d 730; Home Ins. Co. v. Consolidated Bus Lines, 4 Cir., 179 F. 2d 768."

Paramount Film Distributing Corp. v. Applebaum,
supra, 217 F. 2d at 123.

5. THE COURT FAILED TO INSTRUCT ADEQUATELY ON
THE BURDEN OF PROOF.

(Specifications of Error Nos. 9 and 10, pp. 30-31.)

The court erred in failing to instruct the jury with regard to the burden of proof substantially as set forth in defendant's proposed instructions numbers 14(new) and 42. The court instructed on burden of proof on two separate occasions (R. 1234 and R. 1255). It is not contended that those instructions were not substantially correct as abstract statements of the law. Flintkote's position is that the burden of proof of all issues in this case was on plaintiffs, and the court should have so stated. The court's instructions were phrased in terms of the burden of proof being on the party "who asserts the affirmative" (R. 1234, 1255). That was correct, but it was incomplete without a statement that *plaintiffs* asserted the affirmative on all issues. See, *e.g.*, Instruction 116, BAJI.

The discussion and authorities appearing at pages 88 to 89, *supra*, are equally applicable to the court's failure to amplify its correct generalized instruction on burden of proof by instructing that plaintiff had that burden as to all issues and specifically that plaintiffs had that burden with regard to damages.

It has been specifically recognized that a party has a right either to have a specific instruction placing the burden of proof on the particular party having the affirmative of the question, or to have the question so framed that the jury would necessarily understand that the same should be answered affirmatively only in the event the testimony preponderated in favor of such answer, and absent such preponderance, in the negative.

Psimenos v. Huntley, 47 S. W. 2d 622, 624 (Tex. Civ. App., 1932).

Defendant requested a single instruction stating that plaintiffs had the burden of proof on all issues. Defendant's other instructions in the main were predicated upon the giving of such an instruction. The court's instructions did not separately place the burden of proof on plaintiffs as to each issue.

The proper and plain placing of the burden of proof "is not idle ceremony"; "its office is important," and, indeed, "indispensable in the administration of justice."

Boswell v. Pannell, 107 Tex. 433, 180 S. W. 593, 595 (1915).

Although it is possible that the jury correctly understood that the court was referring to the plaintiffs when it referred in the abstract to the party "who asserts the affirmative," the possibility that the jury understood otherwise in respect of some issues in the case is equally sub-

stantial. An instruction that the burden of proof was on *plaintiffs* would not have been misunderstood. Defendant was entitled to nothing less.

Pertinent by way of analogy is a statement by the court in

Paramount Film Distributing Corp. v. Applebaum,
supra, 217 F. 2d at 105:

“In a case of this kind, if the jury finds that the plaintiff is entitled to recover at all, the statute permits the trebling of the amount as a penalty, and to that extent, it partakes of the nature of a criminal charge, for which reason, it would seem, the proof should be stronger than in an ordinary civil action. Hence, the trial court should impress upon the jury as clearly as possible the meaning of the phrase ‘preponderance of the evidence.’”

It is submitted that the court erred in failing to instruct substantially as requested by Flintkote.

6. EACH OF THE FOREGOING ERRORS WAS SUBSTANTIAL AND PREJUDICIAL AND THE JUDGMENT SHOULD BE REVERSED.

Each of the errors discussed in the preceding portions of this section of this brief was substantial and prejudicial. Each of the errors might have provided the basis for the verdict; none was patently harmless. Flintkote contends that there was no evidence to support the verdict (pp. 46 to 60, *supra*) and that in any event the verdict was against the weight of the evidence (pp. 92 to 99, *infra*). We believe it is apparent that the jury's verdict must have been based either on a misconception of the applicable law or upon passion and prejudice. Even if this Court should not agree with us that any one of these errors in the instructions deprived defendant of a fair trial, certainly the

aggregation of all of those errors into a single charge to the jury made the whole of that charge grossly erroneous and exceedingly prejudicial and compels the reversal of the judgment and a new trial of the action.

C. The Court Abused Its Discretion in Refusing to Grant the Motion for a New Trial Based on the Ground That the Verdict Was Against the Weight of the Evidence.

(Specification of Error No. 11, p. 31.)

We have argued, in an earlier section of this brief, that the Court erred in denying defendant's motion to set aside the jury's verdict and to enter judgment for the defendant. There we attempted to show that even after resolving every doubt in plaintiff's favor, there was no evidence to support the implied findings that must have been made if the verdict is to stand—that Flintkote knowingly participated in an unlawful conspiracy in restraint of trade that injured the plaintiffs. We shall not repeat that argument here. If the Court agrees with us, then the judgment should be reversed and judgment should be ordered for defendant and no question of a new trial need be considered.

But even if this Court should take the view that there was enough evidence in the record to prevent the direction of a verdict, the clear weight of the evidence was so overwhelmingly in defendant's favor that it was the plain duty of the trial court to grant a new trial and its refusal to do so constituted an abuse of discretion.

Much time during the trial was devoted to the presentation of evidence relating to the activities of certain of the contractors in connection with bidding on public jobs. As we have previously pointed out, the Court overruled defendant's objection that this testimony should not have

been received until Flintkote was in some way connected with it, and denied a motion to strike it thereafter. While the activities of some of the contractors were such as to indicate the possible existence of a conspiracy to fix prices and allocate certain jobs, there was no evidence, as we have pointed out in the first section of the argument, that Flintkote in any way participated in such a conspiracy, nor, we submit, was there any evidence that Flintkote knew of its existence.

We have heretofore stated our reasons why plaintiff Waldron's supposed statement at the second Manhattan Supper Club meeting (R. 197) that the acoustical contractors were organized and "weren't competing with each other any more" could not be construed as notice of the existence of any conspiracy. But the record will not support a finding that the statement was made at all. Waldron did not remember making that statement when his deposition was taken in October of 1952 (less than a year after the statement was supposedly made), nor did he mention it when his deposition was taken only a week before the trial (R. 347), and then he quite conveniently, and for the first time, claimed he remembered it over three years later when he was on the witness stand. This sudden flash of alleged memory is unbelievable. Even the willing Lysfjord (who was forced to admit he is quite capable of giving false testimony if it serves his purposes (R. 638)), did not purport to remember that Waldron had made any such statement. The other persons at the meeting, Thompson (R. 1033), Baymiller (R. 945-46), and Ragland (R. 790), testified that no such statement was made. It would seem that the evidence of three persons whose veracity is unimpeached and the failure of one of the plaintiffs to recall, should more than override the last-minute supposed recollection of a single interested witness.

There is likewise no evidence that there was any combination, agreement or concert of action between Flintkote and the Flintkote contractors to cut off relations between Flintkote and the plaintiffs. Of course there were complaints by the contractors that a new Flintkote account should be established in Los Angeles without prior notice to them. It would be unbelievable if it were contended that no such complaints were made. But the record stands uncontradicted that Flintkote made no promise or agreement to cut off the plaintiffs, and its representatives unequivocally stated they would take such action, if any, as Flintkote in its own discretion deemed best. See the testimony of Harkins (R. 1066), Krause (R. 1125-26, 1128), Howard (R. 1152), Lewis (R. 1047), Baymiller (R. 951). There is no evidence of any combination or conspiracy among the Flintkote contractors to force Flintkote to discontinue selling tile to plaintiffs—and even if there were such a combination—there is no evidence that Flintkote knowingly joined it. Therefore, even if it be concluded that Flintkote had no purpose, motive or reason to cut off the plaintiffs other than to maintain friendly relations with its older customers, or even if Flintkote feared that it might suffer adverse economic consequences if it did not cut off relations with plaintiffs, this still would not prove participation in a wrongful conspiracy.

We have discussed at length the necessity for finding that Flintkote knew that a conspiracy existed among the contractors before any liability on Flintkote's part could be found. Knowledge by Flintkote is an initial prerequisite to a finding of liability. Knowledge is not, however, the ultimate fact which is determinative of liability. The ultimate fact is whether Flintkote's motive in cutting off plaintiffs was to join in, or act in furtherance of, a conspiracy among the contractors. Obviously Flintkote could

not knowingly join a conspiracy of the existence of which it was unaware. But even if it were found that Flintkote *did* know that a conspiracy existed among the contractors, it would be necessary to find further that Flintkote was motivated by that knowledge and intended to join in the contractors' conspiracy when it cut off plaintiffs. It is submitted that there is no evidence in the record from which a reasonable person could conclude that Flintkote had the requisite motive, and further there is ample and convincing testimony showing that Flintkote's motive in cutting off plaintiffs was not to join in any conspiracy among the contractors, but was to terminate relations with a contractor who did not live up to its representations. The uncontradicted testimony is that the decision to cut off the plaintiffs was made by Harkins, and his testimony is that his motive was to dispose of a contractor he could not trust (R. 1071). How can Flintkote's motive be any different from Harkins'? Besides, every other Flintkote representative who had anything to do with the cut-off testified to the same effect: Ragland (R. 810), Baymiller (R. 953), Thompson (R. 1036-37), and Lewis (R. 1047).

It is only in connection with Flintkote's motive in cutting off plaintiffs that the testimony about the deal between plaintiffs and Flintkote becomes relevant. If plaintiffs were not entitled to do business generally at Los Angeles, Flintkote would have a compelling business reason for cutting off plaintiffs, and this would further support Flintkote's testimony that it cut off plaintiffs for a reason other than to join a conspiracy among the contractors.

The evidence respecting the original deal between Flintkote and plaintiffs is sharply conflicting. If this were an action based on contractual relations between Flintkote

and the plaintiffs, there is certainly enough evidence in the record to justify a finding:

1. That plaintiffs were to do business in San Bernardino and not in Los Angeles; or

2. That plaintiffs were to do business both in San Bernardino and Los Angeles; or

3. That there was no actual meeting of the minds, and that there was a misunderstanding between plaintiffs and defendant, plaintiffs thinking they were to do business in both places, and defendant thinking that plaintiffs were to do business only in San Bernardino and not in Los Angeles.

But this is not an action on the contract. The important thing here is not what the deal was in fact, but what the Flintkote representatives thought the deal was. Proposition (3) supports Flintkote just as much as proposition (1) for this purpose. The overwhelming weight of the evidence is that the Flintkote people at least intended and believed that plaintiffs were entitled to do business generally only in the San Bernardino area. There are certain undisputed facts which point almost irresistibly to this conclusion:

1. The first shipment of tile was sent to San Bernardino (R. 355). Part of it was later "back hauled" into Los Angeles (R. 391-92), but there is no evidence that Flintkote knew anything about this. If this was to be in part a Los Angeles operation, it would seem that at least a substantial part of the initial shipment would have been sent to Los Angeles.

2. The first shipment was paid for by a check drawn on a San Bernardino bank. The funds for that check were made available by a deposit made by plaintiffs the very day it was drawn of a check on plaintiffs' account in a Los

Angeles bank (R. 378-80). If plaintiffs were to do business in Los Angeles, why not use the Los Angeles check to pay Flintkote in the first place? The only reasonable purpose of such an operation would be to indicate to Flintkote that this was a San Bernardino business and to conceal, or at least not emphasize, the existence of a Los Angeles bank account.

3. Flintkote wrote a letter on January 17, 1952 (*ante litem motam*) to the Louis A. Downer Company of Riverside, stating, among other things:

“This company, while offering no exclusive franchise agreement, have recently placed the acoustical tile line in the Riverside and San Bernardino area with the aabeta company of 901 Waterman Avenue, San Bernardino.” (R. 245). (Emphasis ours.)

If Flintkote believed that plaintiffs were to operate in both cities that reference would be made to the “aabeta company of Los Angeles and San Bernardino” and not merely San Bernardino.

4. Mr. Ragland’s report to Mr. Harkins of February 15, 1952 (Deft. Ex. “I”), refers to “the aabeta company of San Bernardino.” This document, also made before there was any litigation or threat of litigation, would not have referred to “the aabeta company of San Bernardino” if Flintkote thought that company was to be in both cities. Indeed the only purpose of the report is to verify the fact that plaintiffs were taking orders for jobs in Los Angeles without having previously notified Flintkote. If Flintkote believed they were entitled to be in the Los Angeles territory, why investigate the matter at all? The fact that the report was called for is consistent only with a *bona fide* belief by Harkins, who made the decision, that plaintiffs were not to operate in Los Angeles. Any other

finding necessarily requires one to conclude that the report was a deliberate fiction contrived after the event.

5. It is undisputed that Flintkote did not give any prior notice to the three contractors handling Flintkote tile in the Los Angeles area that arrangements had been made to supply tile to plaintiffs. This conduct would be quite inexplicable if Flintkote had intended to establish a fourth distributor in the Los Angeles area.

6. It is undisputed that when the Flintkote contractors complained to Flintkote about the plaintiffs' entering the Los Angeles field, the Flintkote representatives immediately and uniformly stated that the plaintiffs were supposed to operate only in the San Bernardino area: Krause (R. 1127), Howard (R. 1151). These discussions also took place before litigation had commenced, and it is fantastic to suggest that this statement as to Flintkote's purposes could have been contrived in advance of the litigation as a motive for the termination and that there was a gigantic combination to give perjured testimony at the trial.

7. It is undisputed that at the termination meeting, Mr. Thompson gave as a reason for the cut-off the fact that the plaintiffs were doing business in Los Angeles: Ragland (R. 810), Baymiller (R. 953), Thompson (R. 1037-38), and even Waldron (R. 239, 361). Lysfjord's account of the termination meeting cannot be relied upon in view of his admittedly false testimony in connection therewith (R. 638). Here again it is inconceivable that plaintiffs' Los Angeles activities would be given as a reason for the termination (again before there was any litigation) unless it was Flintkote's understanding that plaintiffs were not entitled to operate in that territory.

To summarize: there is no evidence in the record from which one may reasonably conclude that Flintkote know-

ingly participated in a conspiracy among the acoustical contractors. On the other hand, there is an abundance of substantial and convincing evidence (1) that even if there was such a conspiracy, Flintkote knew nothing about it; (2) that Flintkote at no time participated in any conspiracy in restraint of trade; and (3) that its motive in cutting off the plaintiffs was the legitimate business reason that the plaintiffs had violated what Flintkote believed to be the understanding reached when business relations were commenced between defendant and plaintiffs as to where plaintiffs' operations were to be conducted.

It seems obvious either (1) that the jury misconstrued the issues and somehow concluded that if the contractors were parties to a conspiracy, that fact alone justified a verdict against Flintkote, or (2) that the jury was motivated by passion and prejudice. To permit this verdict to stand would constitute a gross miscarriage of justice. We believe this Court will conclude that judgment for defendant should be ordered; but in any event, that the verdict must be set aside as against the weight of the evidence and that the case should be sent back for a new trial.

III.

The Damages Were Excessive. Numerous Errors Were Committed in Connection Therewith.

Although Flintkote's position is that it did no wrongful act and that no wrongful act by it has been proved, any discussion of damages must necessarily assume that some grounds for awarding the damages have been shown. References, therefore, to wrongful acts by Flintkote or to participation by Flintkote in a conspiracy in the course of the following discussion do not admit that either a wrongful act or participation in any conspiracy has been or could be proved in the present case.

We complain of three major errors in connection with damages:

(1) The Court permitted proof to be made of, and wrongly instructed the jury to permit recovery for, damages resulting from acts done subsequent to the commencement of the action.

(2) The Court permitted "estimates" to be accepted as evidence which were no more than unsupported speculations of the plaintiffs: and

(3) The Court refused to grant a new trial although the verdict was greatly in excess of any figure that could possibly be justified by the evidence.

We shall cover these points in the order stated.

A. The Court Improperly Instructed the Jury and Improperly Admitted Evidence as to Damages Resulting From Acts Done Subsequent to the Commencement of the Action.

(Specifications of Error Nos. 12 and 13.
pp. 31-34 and 34-43.)

The Court misconceived the period for which damages were recoverable in this action and thereby erred in two respects: (a) it refused to give the correct instructions proposed by Flinkote and erroneously instructed the jury that plaintiffs could recover damages proximately caused by plaintiffs' inability to buy acoustical tile from Flinkote on a direct basis during the period February 19, 1952 to the date of the trial: and (b) it erroneously admitted into evidence, over Flinkote's objection, certain testimony and exhibits which related to alleged injury to plaintiffs (and damages resulting therefrom) by reason of their inability to buy acoustical tile from Flinkote on a direct

basis during the period encompassed in the Court's instruction.

Plaintiffs are entitled to recover in this action all damages (without regard to date of accrual) from injuries proximately caused by wrongful acts for which Flintkote is responsible and which were committed prior to the filing of this action. But plaintiffs may not recover in this action any damages for injuries caused by wrongful acts committed subsequent to the filing of the action.

"Damages accruing since the action began were allowed, but only such as were the consequence of acts done before and constituting part of the cause of action declared on. This was correct."

Lawlor v. Loewe, 235 U. S. 522, 35 S. Ct. 170, 172 (1915).

"Damages which accrue after the suit is brought cannot be recovered in the action unless they are the result of acts done before the suit was commenced."

Connecticut Importing Co. v. Frankfort Distilleries, 101 F. 2d 79, 81 (2d Cir., 1939).

All of the injury for which plaintiffs seek to recover damages arose out of the inability of plaintiffs to purchase acoustical tile from Flintkote on a direct basis. There is no hint of any other source of injury to plaintiffs' business or property.

The critical question, then, is whether plaintiffs' inability to purchase acoustical tile from Flintkote up to the time of trial was the result of a single act or of a series of acts. If it arose out of a single act, plaintiffs were entitled to recover all damages proximately resulting therefrom, and the court was correct. If the inability was a continuing matter and arose out of a series of acts

(express or implied), plaintiffs were entitled to recover only damages proximately resulting from so many of those acts as occurred prior to the filing of the complaint.

Flintkote's conduct in refusing to sell to plaintiffs cannot properly be characterized as a single act. On or about February 19, 1952, Thompson told plaintiffs that *in the future*, Flintkote would not sell to plaintiffs. That statement constituted no more than an indication of Flintkote's then intention not to deal further with plaintiffs. There was nothing irrevocable about the action. Flintkote was not precluded from changing its position at any time and commencing to deal with plaintiffs. Any specific refusal to deal, by its very nature, can constitute no more than a refusal to deal at the time of the specific refusal. Persistence in a course of conduct of non-dealing is therefore necessarily a series of refusals to deal. The refusals may be express, as where an actual demand and refusal occur, or implied, as where the circumstances indicate that demand would be futile. It can probably be properly inferred from the announcement of intention that Flintkote would persist in its announced course of conduct, and Flintkote has admitted that it did so (R. 44-45), but such persistence does not transmute the series of acts embodied in the course of conduct into a single act.

No injury at all resulted from the mere announcement by Thompson that Flintkote would no longer sell to plaintiffs; plaintiffs had no contractual right to purchase tile from Flintkote which would have been anticipatorily breached by Thompson's announcement. There is nothing in the evidence to indicate that plaintiffs wanted to buy any tile at the time the announcement was made. Such injuries as plaintiffs sustained arose out of Flintkote's failure to sell tile to them at such time or times as they

needed and wanted it or were in a position to buy and use it. Obviously plaintiffs sought to recover damages for injuries sustained from not one, but a series of separate occurrences. The fact that the occurrences were negative and implied in fact does not change their separate nature.

That continued refusal to deal constitutes a series of acts rather than a single act was clearly recognized in the following cases:

Connecticut Importing Co. v. Frankfort Distilleries, supra;

Frey & Son v. Cudahy Packing Co., 243 Fed. 205 (D. Md. 1917), *reversed* on ground that no combination in restraint of trade proved, 261 Fed. 65 (4th Cir., 1919).

The decision in the *Connecticut Importing Co.* case is directly in point. There, plaintiff recovered a judgment for treble damages in a suit brought under the Sherman Antitrust Act and tried to a jury. Plaintiff was a distributor in Connecticut for products manufactured by Frankfort Distilleries, one of the defendants. The other defendants were distributors of the same products in Connecticut. Plaintiff refused to conform to an agreement to maintain fixed prices. As a consequence, Frankfort Distilleries refused to supply plaintiff with Frankfort products. On the question now at issue in this case, the Court said:

“Neither do we find any error on the plaintiff’s appeal. The recoverable damages were only those sustained by the plaintiff from the time the cause of action accrued up to the time the suit was brought. *Frey & Son, Inc. v. Cudahy Packing Co.*, D. C. 243 F. 205. Damages which accrue after the suit is brought cannot be recovered in the action unless they are the result of acts done before the suit was com-

menced. *Lawlor v. Loewe*, 235 U. S. 522-536, 35 S. Ct. 170, 59 L. Ed. 341. Here the plaintiff's damages, if any, after the commencement of the suit were due to continued refusal or refusals, in furtherance of the conspiracy, to supply it with the Frankfort products after that time. The unlawful acts which would give rise to such damages had from their nature to be committed in carrying out the conspiracy after the suit was brought. It would be impossible to predict how long such a conspiracy would remain in existence or how long the refusal to sell to the plaintiff would continue and, even if such damages could, in a sense, be treated as the result of refusing to supply before suit was brought, they would be purely speculative." (101 F. 2d at 81.)

Frey & Son v. Cudahy Packing Co., *supra*, was an action for treble damages under the Sherman Act. In connection with fixing the proper period to be considered in assessing damages the court said, at pages 205-206 of 243 Fed.:

" . . . it has long been established that the plaintiff can recover only for such damages as were the consequences of what the defendant did before suit was brought, although it is immaterial whether the effect of what was done showed itself before or after the bringing of the suit, as, for example, where the thing complained of is a tortious injury to the person or property from some particular act, the plaintiff may recover for any damage which manifests itself up to the time of the verdict. On the other hand, where the injury sued for is caused by a mere repetition or continuation of acts of the same class as that for which the suit was brought, the plaintiff's recovery is limited to the damages resulting from such of those acts as were done before the bringing of the suit.

. . .

“In this case the only damage proved by the plaintiff was the loss of profits it would have made on resales of Old Dutch Cleanser, if it had been able to buy Old Dutch Cleanser at the price at which other jobbers could obtain it. Such damage is a damage which occurs from day to day, and the damage on one day is not the necessary result of an act done by the defendant at an earlier date.”

In *Savannah Theatre Co. v. Lucas & Jenkins*, 8 F. R. Serv. 34.12, Case 2 (S. D. Ga. 1944), plaintiff brought an action under the antitrust laws complaining about defendant's refusal to grant plaintiff an adequate supply of suitable films to exhibit in its theatre. Plaintiff sought by supplemental complaint to allege the continuance of the conspiracy beyond the date of the filing of the complaint, and to recover damages incidental to such continuance. The court disallowed the supplemental complaint, saying:

“As concerns the alleged continuing conspiracy, it appears that while damages accruing since the action was instituted are allowable, they must be suffered in consequence of acts done before the institution of the suit and constitute a part of the cause of action declared on. Therefore the question of the continuance of the conspiracy and damage resulting from such acts in pursuance thereof subsequent to the filing of the suit are not recoverable in this action [*sic*].”

In *Bordonaro Bros. Theatres v. Paramount Pictures*, 203 F. 2d 676, 677 (2d Cir. 1953), Judge Clark thus described the situation there presented:

“This is a continuance of the litigation which we considered in *Bordonaro Bros. Theatres, Inc. v. Paramount Pictures, Inc.*, 2 Cir., 176 F. 2d 594. Plaintiff there had recovered against defendants for violation of the antitrust laws, 15 U. S. C. §§1, 2, 15, injuring it in its operation of the Palace Theatre in

Olean, New York, for the period up to the time of commencement of that action, September 16, 1946. The present suit was brought to recover its later damages from September 16, 1946, until March 14, 1948.”

In the two following cases, relating to failures to supply motion pictures on suitable runs and clearances on a continuing basis, the damages were limited (in fact, but without discussion) to those accruing by reason of plaintiff's failure to obtain appropriate films prior to the filing of the complaint.

William Goldman Theatres v. Locw's, 69 F. Supp. 103 (E. D. Pa., 1946), *affirmed*, 164 F. 2d 1021 3d Cir.), *cert. denied*, 334 U. S. 811, 68 S. Ct. 1016 (1948);

Milwaukee Towne Corp. v. Locw's, 190 F. 2d 561 (7th Cir. 1951).

It follows that the maximum limit of plaintiffs' recovery in the instant case would be damages for such injuries as were proximately caused by Flintkote's refusals (express and implied) to sell acoustical tile to plaintiffs prior to the commencement of the action (July 21, 1952); or, as stated in Flintkote's requested instructions numbers 46 (e) and 46(f) (which were refused):

“(e) Plaintiffs' recovery in this action, if any, must be limited to damages resulting from the inability of plaintiffs to purchase acoustical tile from Flintkote on a direct basis during the period February 19, 1952, to July 21, 1952.

“(f) Plaintiffs cannot recover in this action any damages which may have resulted from their inability to obtain acoustical tile from the defendant Flintkote on a direct basis during any period commencing on or after July 21, 1952.”

The court was wholly wrong, therefore, when it admitted testimony and exhibits relating to damages allegedly resulting from plaintiffs' inability to purchase acoustical tile from Flintkote after the filing of the complaint and through the commencement of the *trial* of the action, May of 1955, and in instructing the jury that its verdict could reflect damages resulting from plaintiffs' inability to buy tile from Flintkote during all of that period.

In addition to being erroneous because they allowed the jury to find damages beyond the maximum period for which damages could be recovered in this action, the court's instructions that damages could be awarded for plaintiffs' inability to buy tile from Flintkote up to the time of the trial and its action in admitting evidence of such damages were erroneous for the reason that there was no evidence tending to show sufficient wrongful acts by Flintkote to entitle plaintiffs to such damages.

Plaintiffs can only recover damages for injuries resulting from "anything forbidden in the antitrust laws." (15 U. S. C. A. §15.) The antitrust laws forbid refusing to sell only when such refusal is pursuant to a knowing participation in an unlawful conspiracy. (See discussion at pages 48-50, 53, 58-59, *supra*.) Persistence in a course of conduct of non-dealing involves a series of separate acts. (See discussion at pages 102-105, *supra*.) Therefore plaintiffs could recover damages only for injuries resulting from so many of the acts in the series as were proved to have been pursuant to knowing participation in an unlawful conspiracy.

Bordonaro Bros. Theatres v. Paramount Pictures, supra, was an action to recover damages for alleged violations of the antitrust laws. The plaintiff had theretofore recovered its damages accruing prior to September 16,

1946, the date of commencement of a prior action. The present suit was brought to recover its damages accruing subsequent to that date by reason of the continuation of the prior practices. In connection with proof of the continuation of the conspiracy, the court said:

“Nor do we think that award vitiated by errors on the part of the trial judge. The first assigned error was the refusal of binding instructions in favor of the plaintiff based on the finding of conspiracy in the previous case. But the judge properly—we might say inevitably—ruled that the plaintiff must prove that the conspiracy continued from 1946 to 1948, and so charged. The judge actually went far in the plaintiff’s favor when he told the jury that the former judgment ‘is conclusive proof that there was a conspiracy between the defendants prior to September 16, 1946,’ . . .” (203 F. 2d at 678.)

In this case there was no proof that any conspiracy which might have provided the motive for Flintkote’s announcement that it would no longer deal with plaintiffs continued beyond February 19, 1952. All witnesses called by Flintkote testified that there never was any such conspiracy. The only evidence whatsoever respecting the continuance or ending of any conspiracy was Lysfjord’s testimony (R. 648, 675, 678-79) that any conspiracy which may have existed among the contractors had ended by May or June of 1952. There was no evidence that any conspiracy existed among the acoustical contractors after that time. Thus, Flintkote’s refusals to sell tile to plaintiffs after that date could not have been in furtherance of or pursuant to a knowing participation in an unlawful conspiracy and thus could not have been “anything forbidden in the antitrust laws”, and plaintiffs could not have been entitled to any damages resulting therefrom. It follows,

then, that any evidence of damages resulting from inability of plaintiffs to buy acoustical tile from Flintkote after "May or June" of 1952 was wholly irrelevant to any cause of action which the evidence might conceivably be thought to sustain.

From the foregoing, it should be apparent that the court's action in instructing the jury that it could award all damages resulting from plaintiffs' inability to buy acoustical tile from Flintkote "during the period February 19, 1952 to the time of the beginning of this trial", in admitting evidence tending to prove such damages and in failing to give defendant's requested instructions numbers 46(a) through 46(e) was erroneous in two basic particulars: (1) it allowed the jury to award damages to plaintiffs for injuries resulting from acts done and on causes of action arising (if at all) after the commencement of the action; and (2) it allowed the jury to award damages to plaintiffs for injuries resulting from acts which were not proved to be wrongful by any evidence whatsoever.

That the error was substantial and prejudicial should be obvious, since it extended the maximum period for which plaintiffs could recover from five months to thirty-nine months (almost eight-fold), permitted introduction of evidence about estimated sales of "one and one-half and two cars a month", and generally permitted introduction of testimony which magnified the alleged damages resulting to plaintiffs beyond all reason and during a period entirely irrelevant to the case at bar.

B. The Court Permitted Evidence to Be Introduced Which Allowed Damages to Be Based on Speculation.

(Specification of Error No. 13, pp. 34-43.)

The record is clear that the testimony of the witnesses and the portions of exhibits 38 and 39 relating to damages based on lost profits were pure unwarranted speculation of interested witnesses and were without any foundation in fact. Each of the plaintiffs testified he estimated that plaintiffs would have sold a carload of tile per month in 1952, one and one-half carloads per month in 1953, and two carloads per month in 1954 (Lysfjord: R. 629, 630; Waldron: 687-88.) The basis for Lysfjord's testimony in that respect is found at R. 628-29 as follows:

"Q. (By Mr. Ackerson): What is the basis for your computation of the second line there, beginning with 'During the first year of business,' and so forth?

A. Because in some time past I had been selling a carload or more, generally more than that a month, for the R. W. Downer Company.

Q. What basis do you have for assuming that you could have done that for yourself? That is the purpose of your statement, isn't it? A. I can't see any reason in my mind that I shouldn't be able to do as well for myself as working for somebody else. I surely would work as hard or probably twice as hard for myself as for anybody else.

Q. Would you have had the same contacts for yourself as you had with the Downer Company?

A. I most certainly would."

No testimony was offered to indicate that Waldron's testimony had any basis other than wishful thinking. There is nothing in the record to indicate that plaintiffs were experts on business prognosis for a new venture. There

is not one fact in evidence or adverted to in any way in the Record which might justify plaintiffs' gratuitous assumptions regarding the possible size and growth of their business. *Plaintiffs'* business had no history on which any intelligent prognosis could be based. There was no evidence to show that plaintiffs' business was comparable to that of anyone else, or that the history of the other business was used as a basis for estimates about the future of plaintiffs' business. There was no evidence that plaintiffs had ever been connected with the management of any business, much less a *new* business or a new acoustical tile business. Waldron expressly testified he had no experience on which to base his opinion (R. 711-12). In fine, there is nothing in the record to show that plaintiffs were qualified to estimate the growth of their business or that, even if qualified, they had any basis for their estimates.

The calculations by which lost profits were derived from estimated gross sales were similarly without any foundation in the evidence or any showing that plaintiffs were qualified, by experience or otherwise, to make the assumptions upon which those calculations rested. The basic assumption was that plaintiffs would realize a net profit of 20 percent of gross sales (Lysfjord: R. 627). Apparently that was on the theory that the Downer company paid its salesmen 10 percent of the gross sales and retained a net profit of 10 percent; but plaintiffs would not have to pay salesmen and so would take 20 percent net profit (Lysfjord: R. 626-27). The assumption that plaintiffs would do as well in business as the Downer company was wholly unwarranted. There is no evidence that plaintiffs had the finances, labor force, or inherent ability to do so. There is nothing to indicate that plaintiffs

could operate as efficiently as the Downer company (or that plaintiffs even knew how the Downer company operated).

It is thus apparent that there was no basis for any of the material appearing in exhibits 38 and 39 relating to estimated future profits or for any of the plaintiffs' testimony in respect of the calculations therein. It is submitted, then, that the testimony and exhibits were utterly incompetent, had no probative value, constituted nothing but speculation and wishful thinking, and should not have been admitted into evidence.

Exhibit 43 and Waldron's testimony with respect thereto (R. 689-92) consisted of an assumption that the net profits of plaintiffs' business over the period January 1, 1952 to January 1, 1955 would have equaled 72 times the monthly income of both plaintiffs at the end of their employment by the Downer company. There is absolutely nothing in the record to support that assumption. This exhibit, and the testimony in connection with it likewise should not have been admitted.

A rather full discussion of this problem in a generally similar situation is found in

United States v. Griffith, Gornall & Carman, 210 F. 2d 11 (10th Cir., 1954).

This was an action by a contractor for damages caused by flow of rain water from a government air base onto a pipeline under construction. Included in the plaintiff's claim was a demand for loss of profits. The trial court excluded certain evidence as based on pure speculation. Other evidence as to lost profits was admitted. The Court of Appeals held that all of the testimony on the subject should have been rejected.

The court recognized that the *fact* of damage must be proved to a certainty; that while the *amount* need not be proved with mathematical exactness, the evidence to be accepted must form the basis for a reasonable approximation, and mere speculations and guesses can have no probative value.

The following extract from the opinion deals with this point (210 F. 2d at 13, 14):

“To prove loss of profits and damage to its business, the plaintiff relied exclusively upon the testimony of its president. He testified that the corporation had been in existence since 1946 and that he thought it had made ‘something close to \$80,000.00 of profit’ during those years, which ‘amounts to about \$1,000.00 a month during the time’ that it was actively doing work. He stated that he believed that the plaintiff would have earned approximately \$5,000.00 during the time that was required to make the repairs. The court excluded this evidence as speculative.² . . . What the loss of profits or damage to plaintiff’s business would be, if any, is pure guess work on the part of plaintiff’s president and far too speculative to sustain a judgment for this claim. The language used by the trial court as quoted in note 2, is applicable to all the evidence which was introduced to sustain the claim for special damages.”

The remarks of the trial judge as reported in the footnote mentioned in the above quotation were as follows:

“Now, I don’t see any materiality to that, what they did some other year. As a matter of fact, this whole thing is highly speculative. The fact is they didn’t have any other contracts. They might have obtained a contract if they had been on it and they might not. They might have made a profit on it

if they had been on the contract and gotten the contract and they might not. As a matter of fact, if these people are reimbursed for their materials that they had to lay out as a result of this damage, for the payroll that they had to meet as a result of this damage, how can you claim anything more? You can't claim that they would lose something. All you can claim is that they might have made a profit if they had not been working on this job and if they had gotten another job to do. I don't think that is admissible; I think it is speculative. Certainly in comparison with what they earned in 1950. I don't see that."

The foregoing discussion demonstrates that the court erred by receiving in evidence plaintiffs' exhibits 38, 39 and 43 and the testimony which they purported to summarize. The exhibits, except as related to increased prices paid for acoustical tile (in which they were grossly inaccurate) were not really evidence at all. They were mere demands for large sums of money and their admission into evidence put in the jury's hands documents showing big figures unrelated to any relevant facts. By their very admission, the jury may well have gotten the impression that they bore the seal of approval of the court. The exhibits and the related testimony not only were objectionable as based on pure speculation; they were in part based on an erroneous damage period and should also have been excluded on that ground. (See preceding section.) The trial court's error in this respect was largely responsible for the grossly excessive verdict.

C. The Court Abused Its Discretion in Failing to Grant a New Trial on the Ground That the Damages Fixed by the Jury Were Excessive.

(Specification of Error No. 11, p. 31.)

The portions of the statutory authorization for this action pertinent to the question of damages are as follows:

“Any person injured in his business or property . . . may . . . recover threefold the damages by him sustained, . . .”

15 U. S. C. A. §15.

Thus, to be successful the plaintiff must prove as a fact that he has been injured in his business or property and must also prove the extent of that injury and the amount of the damages required to compensate him therefor.

The fact that plaintiff has been injured (or fact of damage) must be proved without resort to speculation or guess work.²

²“ . . . recovery cannot be had unless it is shown, that, as a result of defendants' acts, damages in some amount susceptible of expression in figures resulted. These damages must be proved by facts from which their existence is logically and legally inferable. They cannot be supplied by conjecture.”

Keogh v. Chicago & N. W. Ry. Co., 260 U. S. 156, 164-165, 43 S. Ct. 47, 50 (1922).

“ . . . plaintiffs must show that, as a result of defendants' acts, actual damages were sustained— . . . These damages must be proved by facts from which their existence is logically and legally inferable—not by conjectures, or estimates. They must not be speculative, remote, or uncertain.”

American Sea Green Slate Co. v. O'Halloran, 229 Fed. 77, 79 (2d Cir. 1915).

This Court's discussion of proof of injury with relation to specific facts prior to holding that injury in the form of lost profits was not shown in

Wolfe v. National Lead Co., 225 F. 2d 427 (9th Cir. 1955),

indicates this Court's firm enforcement of the rule requiring that injury (or the fact of damage) be proved by facts and not speculation, surmise or conjecture. The proofs submitted in that case and in the case at bar are

"Damages must be actual, not speculative or conjectural."

Loew's v. Cinema Amusements, 210 F. 2d 86, 95 (10th Cir.), cert. denied, 347 U. S. 976, 74 S. Ct. 787 (1954).

"Actual damages only may be secured. Those that are speculative, remote, uncertain, may not form the basis of a lawful judgment. The actual damages which will sustain a judgment must be established, not by conjectures or unwarranted estimates of witnesses, but by facts from which their existence is logically and legally inferable. The speculations, guesses, estimates of witnesses, form no better basis of recovery than the speculations of the jury themselves."

Central Coal & Coke Co. v. Hartman, 111 Fed. 96, 98 (8th Cir. 1901).

"The fact of damage itself is not subject to speculation."

McWhirter v. Monroe Calculating Mach. Co., 76 F. Supp. 456, 465 (W. D. Mo. 1948).

"It is generally held that the expected profits of a commercial business are too remote, speculative and uncertain to permit a recovery of damages for their loss. To warrant such a recovery, in other words, the proof must pass the realm of conjecture, speculation or opinion not founded on facts, and must consist of actual facts from which a reasonably accurate conclusion regarding the cause and the amount of loss can be logically and rationally drawn. *Winter v. Haan*, Mo. App., 211 S.W. 2d 544; *Gildersleeve v. Overstolz*, Mo., 90 Mo. App. 518; *Central Coal & Coke Co. v. Hartman*, 8 Cir., 111 F. 96; *Ellerson v. Grove*, 4 Cir., 44 F. 2d 493; *Keogh v. Chicago & Northwestern Railway Co.*, 260 U. S. 156, 43 S. Ct. 47, 67 L. Ed. 183."

Fireside Marshmallow Co. v. Frank Quinlan Const. Co., 213 F. 2d 16, 18 (8th Cir. 1954).

analogous and this Court's analysis in the *Wolfe* case is exceedingly pertinent here.³

A little more latitude is permitted to the finder of fact in the matter of the measure of the damages sustained, and "the jury may make a just and reasonable estimate of the damage based on relevant data, and render its verdict accordingly."

Bigelow v. RKO Radio Pictures, 327 U. S. 251, 264, 66 S. Ct. 574, 579-80 (1946).

³"Moreover, aside from the fact that the method of gross profits used by appellants is not a criterion of injury in this case, appellants are foreclosed from recovery because of other considerations. In the first place, they assume that they would have received larger quantities of titanium except for the alleged conspiracy; but there is no evidence that they would have, or that they were entitled to larger quantities than they actually received. They further assume, without proof, that the conditions of supply and demand in titanium pigments were the same in 1949 as in preceding years; and they likewise assume, without evidence, that the market conditions for paints were the same. In addition, there is no evidence that they would have manufactured and sold more paint in 1947 and 1948 if they had received greater amounts of titanium pigment. It appears that other pigments could be, and were, used as substitutes for titanium; and appellants admitted that they were able to get all of the ingredients to manufacture paint that they needed except titanium pigments. In fact, they purchased immense quantities of one of such substitutes, lithopone, in 1948, buying 403,050 pounds of it in that year. They could not have been injured by their failure to secure all the titanium pigment they wanted, if they were able to obtain all they could use of a substitute in the form of lithopone. It is true that appellants claim that lithopone was not a fair equivalent of titanium pigment as it cost considerably more; and it appears that they paid \$18,400 more for it during the period in controversy than they would have spent for a comparable quantity of titanium pigment. However, if they passed this extra cost on to their customers, it would not result in any reduction in their profit; and there is no evidence that they did not pass it on. It is to be said that appellants also contend that the quality of their paint was lowered by the necessity of using lithopone rather than titanium; but there is no proof that they failed to sell any part of their paint production at a profit."

Wolfe v. National Lead Co., 225 F. 2d 427, 432 (9th Cir. 1955).

But even in cases where the *quantum* of the damage is impossible of precise determination and estimates thereof are required, there is no departure from the rule requiring precise proof of the fact of injury or any suggestion that the jury's estimates of the amount of the recovery may be without relevant factual support.

“It is true that there was uncertainty as to the extent of the damage, but there was none as to the fact of damage; and there is a clear distinction between the measure of proof necessary to establish the fact that petitioner had sustained some damage and the measure of proof necessary to enable the jury to fix the amount. The rule which precludes the recovery of uncertain damages applies to such as are not the certain result of the wrong, not to those damages which are definitely attributable to the wrong and only uncertain in respect of their amount.”

Story Parchment Co. v. Paterson Parchment Paper Co., 282 U. S. 555, 562, 51 S. Ct. 248, 250 (1931).

Clearly, plaintiffs can recover damages for all injuries sustained by reason of the wrongful acts which form the basis of the suit, but in order to recover for any particular type of injury plaintiffs must prove that they were injured in that respect. It does not follow from a showing that plaintiffs were injured by increases in their out-of-pocket costs in certain respects that they were entitled to recover damages for profits lost by reason of business which was not done. Before plaintiffs can recover damages for lost

profits they must show that they were injured by losing business from which profits could have been obtained.⁴

It certainly would not be contended that if a personal injury plaintiff showed that he had suffered injuries by reason of a broken arm he would be able to recover damages in respect of a broken leg which he had not offered any proof had been broken as a result of the occurrence complained of or at all. The situation is identical in respect of injuries to a business. If plaintiffs can show that they were injured by having their out-of-pocket costs increased, they are entitled to recover for the increase in those costs. If plaintiffs can show that they were injured by having the value of their business diminished, they are entitled to recover for that diminution in value. If plaintiffs can show that they were injured by losing profits from business which they would have done but for the wrongful act or acts of the defendant, they are entitled to recover damages for those lost profits. But plaintiffs are not entitled to recover damages for any injuries which they have not clearly shown that they have suffered, and they must produce relevant data from which the amount of damages resulting from any injury proved may reasonably be estimated.

⁴*Story Parchment Co. v. Paterson Parchment Paper Co.*,
supra;

Wolfe v. National Lead Co., *supra*;

American Sea Green Slate Co. v. O'Halloran, *supra*, note 2;

Fireside Marshmallow Co. v. Frank Quinlan Const. Co.,
supra, note 2;

United States v. Griffith, Gornall & Carman, 210 F. 2d 11
(10th Cir. 1954).

In this case, plaintiffs attempted to demonstrate and recover damages for three categories of injury to their business:

(1) Out-of-pocket expense at San Bernardino which resulted in no benefit to plaintiffs because they abandoned their San Bernardino premises following February 19, 1952.

(2) Out-of-pocket expenses in the form of the increased cost of acoustical tile purchased from sources other than Flintkote over what the cost would have been for equivalent tile from Flintkote on a direct basis.

(3) Profits which plaintiffs would have realized from business which they would have done if they had been able to obtain acoustical tile from Flintkote on a direct basis.

Flintkote contends that the evidence will not support the verdict that plaintiffs were damaged in any combination of those respects in any sum approaching \$50,000.

(1) OUT-OF-POCKET EXPENSES AT SAN BERNARDINO.

Plaintiffs' evidence of out-of-pocket expenses at San Bernardino was adequate to prove both the fact of injury and the amount of the damages suffered thereby. The items of expense were apparently taken from plaintiffs' books and were satisfactorily definite and certain. That evidence would have supported a verdict for plaintiffs in the sum of \$1920.

(2) OUT-OF-POCKET EXPENSES IN THE FORM OF INCREASED COST OF ACOUSTICAL TILE ACTUALLY PURCHASED.

Plaintiffs introduced certain testimony (summarized in exhibits 38 and 39) tending to show that, during the period January 1, 1952 to May 3, 1955, they paid \$87,-808.97 for acoustical tile purchased from persons other than Flintkote and that they paid \$12,758.57 more for that tile than Flintkote would have charged them for equivalent tile. It was conclusively demonstrated that plaintiffs' figures in this regard were inaccurate (R. 591, 592, 665-68, 702-03), and Flintkote objected to the admission in evidence of Exhibits 38 and 39 because of their erroneous nature (R. 692). Be that as it may, Flintkote definitely proved (Ex. K) that during said period plaintiffs paid \$9,240.82 more for acoustical tile than Flintkote would have charged them for similar tile on a direct basis in carload lots and that plaintiffs' increased cost for such tile in the calendar year 1952 amounted to \$1,594.75.

There was no evidence tending to show that plaintiffs bought any acoustical tile from anyone other than Flintkote prior to the filing of the complaint in this action, or that they paid any more for it than Flintkote would have charged them. Technically, then, there was probably no proof either of the fact of injury or the amount of damage in respect of increased cost of tile during the proper damage period, *i. e.*, prior to the filing of the complaint in this action. But perhaps the jury could have inferred that part of plaintiffs' increased tile cost in 1952 as incurred prior to the filing of the complaint, and, in that event, the fact of injury in the form of increased tile cost would have been proved and the jury would have been justified in assessing plaintiffs' damages by reason of said injury in some amount less than \$1,594.75.

(3) PROFITS WHICH PLAINTIFFS WOULD HAVE REALIZED FROM BUSINESS THEY WOULD HAVE DONE IF THEY HAD BEEN ABLE TO BUY TILE FROM FLINTKOTE.

In order to prove the fact of injury in the form of lost profits from business which they would have done if they had been able to purchase tile from Flintkote, plaintiffs had to show: *first*, that they would have done more business than they did do; *second*, that if they had done any additional business, they would have made a profit on it; and *third*, that their inability to buy tile from Flintkote was the proximate cause of their failure to do more business. It is submitted that the evidence cannot sustain any finding that the fact of such injury was so proved and provides no relevant data from which the amount of damages could be computed.

First, there was no evidence that if plaintiffs had been able to purchase acoustical tile from Flintkote on a direct basis they would have done any more business than they did.

(a) There was no substantial showing that any business was available which plaintiffs might have done. There was no substantial showing that any acoustical tile was sold by anyone other than plaintiffs. There was no showing that any of the general contractors with whom plaintiffs claimed to have contacts did any business requiring acoustical tile. There was no showing that any business was offered to plaintiffs and turned away by them.

(b) There was no showing, even if additional business was available, that plaintiffs bid on, negotiated for, or attempted to obtain it. (On the contrary, the only bid shown by the evidence to have been made was at a price

known to be unreasonably high and so high as to indicate that plaintiffs did not desire to have the contract awarded to them (R. 677).)

(c) There was no showing that if additional business was available and if plaintiffs would have attempted to get it, they would have been successful in having any contracts awarded to them. There was no showing that they would have bid suitable prices. There was no showing that any general contractors would have been willing to let contracts to a newly established firm without any history, record, or reputation and with only limited resources.

(d) There was no showing that plaintiffs had the resources to do any more business than they actually did. There was no showing that they were financially able to handle more business, that they had a suitable labor force to take care of increased business (or that such labor could have been obtained had it been required), or that they had the inherent ability to manage and operate a business of any greater magnitude.

Second, there was no showing that plaintiffs would have made a profit on any additional business if they had done it.

(a) There was no showing of the price at which contracts plaintiff might have obtained were let. The only evidence relating to prices at which contracts were let was (1) Lysfjord's testimony that between May or June of 1952 and September of 1952 a "cut-throat competitive condition" existed (R. 678); (2) Lysfjord's testimony that prices on smaller jobs were "very, very competitive" from September of 1952 to the time of trial (R. 675-76); (3) Lysfjord's testimony that prices on larger jobs were "very, very high" (R. 676); and (4) Lysfjord's testimony about the Airport Junior High School job and his 50

percent mark-up bid (R. 677). But none of that testimony is sufficiently certain to indicate what the prices actually were.

(b) There was no showing of the costs which plaintiffs would have sustained in the performance of such contracts. There was no showing of labor costs, material costs (other than acoustical tile), overhead expense, costs of obtaining additional financing, or such other costs and expenses as might have been incident to the operation of a larger enterprise.

(c) There was no showing that plaintiffs had the ability to manage a larger business in such manner as to realize a profit. There was not even a showing that any acoustical contractor (no matter how efficient) made a profit on a contract or contracts that plaintiffs did not get. (We do not concede that such a comparison would have been appropriate here, *Wolfe v. National Lead Co.*, *supra*, but its absence is noted to demonstrate how completely devoid of data—relevant or otherwise—the record is.)

(d) Plaintiffs' generalized and unsupported remarks about Downer's profits in a prior period are wholly irrelevant to whether *plaintiffs* would have made a profit during the period in question (either the proper period or the period covered by the court's erroneous instructions).

(e) The only specific evidence bearing on the question whether plaintiffs would have made a profit on additional business is that plaintiffs made net profits of 5 per cent of gross sales in 1952, 11 per cent of gross sales in 1953, and 5 per cent of gross sales in 1954 (Ex. L). That information is admittedly relevant, but absent information regarding the extent to which additional work would have increased plaintiffs' costs or the contract prices at which additional work might have been obtained, such information

cannot support an inference that additional work would have been handled at a profit.

Third, there was no showing that plaintiffs lost any business because they could not buy tile from Flintkote or that they would have obtained any additional business if they had been able to buy tile from Flintkote.

In the nature of things, since plaintiffs did not have any history as an established business using Flintkote acoustical tile, plaintiffs could not show that being unable to purchase acoustical tile from Flintkote had caused any actual diminution in either the volume of their business or the profits resulting therefrom.

Plaintiffs' principal evidence regarding business lost was as follows: (1) they thought that they could have sold a carload of acoustical tile each month during the calendar year 1952 (one and one-half carloads per month in 1953, and two carloads per month in 1954) if they had been able to obtain Flintkote tile on a direct basis (Exs. 38 and 39); (2) they thought that each of them could have sold the same monthly quantity of acoustical tile in their own business as that which they had been selling for the Downer company (Ex. 43) (note that the quantities in (1) and (2) are not the same); whereas (3) they actually only sold tile costing them \$66,756.95 (R. 1195), about 9½ carloads, in addition to the car and one-half of Flintkote tile, for a total of about 11 carloads in 40 months.

There was nothing in the evidence to show that plaintiffs were qualified to estimate the amount of business which they might have done (see pages 110-12, *supra*); or that plaintiffs' opinions were based on any factual data whatsoever; or that their "opinions" were anything other than speculation and wishful thinking. The entire basis

of plaintiffs' opinions regarding business they might have done was neatly summarized by Lysfjord when he said (R. 628): "I can't see any reason in my mind that I shouldn't be able to do as well for myself as working for somebody else." The fallacy of that reasoning is readily apparent when one considers that thousands of new business ventures fail every year—and it may be assumed that many of the persons who embarked on those enterprises had been reasonably successful when "working for somebody else" in the same field.

There was no showing that plaintiffs' success at the Downer company as salesmen was the result of anything other than that the Downer company was a well-established acoustical contracting firm having an excellent reputation in the business (R. 1134-36). There was no showing that the acoustical contracting market during the period in question was comparable to the market during plaintiffs' employment by the Downer company. There was no showing that, even assuming a comparable market, plaintiffs would have enjoyed the same measure of success representing their own new, small, underfinanced enterprise that they had representing the Downer company.

The only testimony touching upon any adverse effect of plaintiffs' inability to purchase tile from Flintkote on plaintiffs' business is that of Waldron as follows:

"Q. Now, Mr. Waldron, after your source of supply of acoustical tile was terminated by The Flintkote Company, were you able to carry on your acoustical tile business? A. Not for some time.

Q. Did you do any bidding after that date for some time and, if so, how long a time? A. We didn't do any bidding for a couple of months other than with the material we have had before.

Q. By the 'material you have had before,' do you mean the material you got in this first shipment of tile? A. Yes.

Q. Can you explain just how you did carry on after that termination with respect to your acoustical tile activities? A. The acoustical tile was curtailed, and later on, a month or two or three, we were able to line some materials from lumber yards and the E. J. Stanton people had some, the Harbor Plywood, and we were able to eventually get some.

However, the Harbor Plywood supply was not an AMA rated material, so it was limited to where we could put it, and any of this material we had to pay a premium of around 17 per cent to 20 per cent greater than we had paid before.

Q. Can you name some of these places where you bought this tile at that price? A. Yes, we bought from the Harbor Plywood people, E. J. Stanton people, and Louis A. Downer, acoustical contractor." (R. 270-71.)

Q. After your supply was terminated, were you able to continue doing business with your established general contractors in this area? A. Oh, no, their volumes were too great for us and we had no assurance of being able to supply a job.

Q. Can you explain that statement? I mean, why didn't you have any assurance of a supply? You were able to buy acoustical tile at enhanced prices, were you not? A. The bids, the bidding was difficult. Our markup, by the time we paid the 15 to 25 per cent, we would lose the job, because we were overpriced. That happened.

And then we couldn't be sure through the lumber yards of getting proper sizes of tile or proper delivery at that time.

Q. Could you be assured at the lumber yards or the other acoustical tile contractors, that they could or would supply the amount necessary for any substantial job, the amount required on a substantial job? A. The other acoustical contractors—

Q. You mentioned Louie A. Downer Company as one supply you had. And then referring to Louie A. Downer Company, could you depend on him to be there with the tile when the job was ready? A. No, not completely. He cooperated with us as best he could. But he had only a 12x12 tile, I believe, at that time. And most of the market jobs we were working in and wanted to work in with people we had been doing business were 24x24, and he couldn't supply that one at all.

Q. Well, let's take the lumber yards, do they carry stock on hands at all times— A. Very little.

Q. —sufficient to do a sizeable job? A. No, no, that would have to be arranged months ahead.” (R. 274-75.)

Waldron's only statement that any work at all was lost was that “. . . we would lose the job, because we were overpriced. That happened.” But Waldron did not advert to any specific instance when “That happened”; nor did he indicate what price plaintiffs bid, or the price at which the contract was awarded, or that plaintiffs would not have been “overpriced” even if they had been able to buy Flintkote tile on a direct basis.

There was no direct evidence that plaintiffs seriously attempted to obtain acoustical tile from another manufacturer on a direct basis or that tile could not be obtained except at an enhanced price from anyone other than Flintkote.

The direct evidence indicates that the increased tile cost was not the reason why plaintiffs were "overpriced" and that they might have been "overpriced" in any event. Plaintiffs testified that (when obtained on a direct basis) tile cost should be one-third of the gross contract price (R. 602, 624) and that their net profit should be 20 per cent of the gross contract price (Exs. 38 and 39). Presumably that was how they bid; and if they insisted on preserving that ratio of tile cost to contract price, the reflection of the increased tile cost would result in a bid substantially higher than a bid based on the lower direct basis tile cost (Downer's bid, for example). But on their own figures, plaintiffs did not need to preserve that ratio to make a profit. They paid 16 per cent more for tile than they would have paid Flintkote (R. 1195). 16 per cent of one-third of the gross contract price equals $5\frac{1}{3}$ per cent of the gross contract price. Presumably plaintiffs' other costs were not affected by the increase in their tile cost. Therefore, on their own figures, plaintiffs (1) could have kept the same ratio of tile cost to contract price and increase the contract price 16 per cent, resulting in a net profit of $31\frac{2}{3}$ per cent; or (2) could have kept the same calculated dollar profit per job as if their bid had been based on the lower tile cost (twice Downer's profit) by increasing the gross contract price by $5\frac{1}{3}$ per cent; or (3) could have absorbed the increased tile cost and met Downer's prices, retaining a calculated net profit of $14\frac{2}{3}$ per cent ($4\frac{2}{3}$ per cent more than Downer); or (4) could have cut Downer's price by $4\frac{2}{3}$ per cent, retaining a calculated net profit of 10 per cent (equal to Downer's normal profit). (In the foregoing discussion 100 percent equals the gross contract price based on a bid of three times the tile cost on a direct basis. All percentage figures relate to that basis.) Thus, plaintiffs'

own figures show that if their bids were too high and they lost business because they were “overpriced”, it was obviously their own fault, and was not traceable to increased tile costs resulting from their inability to purchase tile from Flintkote on a direct basis.

The only specific evidence of a job that plaintiffs failed to get or of the price at which a job was actually let and its relationship to costs was Lysfjord’s testimony as follows:

“A. I remember a school job called the Airport Junior High School, I believe. It was a job upwards of \$60,000 or \$70,000 worth of work, and we bid the job with the intentions of, if we were fortunate enough to get it, we would have enough profit in it to be worth while. By that I mean we had our mark-up somewhere around 50 per cent above our basic cost. And the contractor that was successful in getting it was about \$200 or \$300, or maybe \$400, under our figure. So you can see that that particular job was quite high.

Q. You checked that job, I mean the aabeta company checked the bid figures on that job? A. Yes, indeed.” (R. 677.)

* * * * *

“Q. You apparently had an assured source of supply when you put in that bid, didn’t you? A. I would say we did.” (R. 1212.)

Note that Lysfjord bid a mark-up of 50 per cent above his basic cost (presumably as enhanced by any increased cost of tile), whereas he had testified that a normal mark-up of 30 per cent should result in a net profit of 20 per cent of the gross contract price (R. 626-27), and note further that the successful contractor’s bid was only about one-half of one per cent of the gross contract price lower than plaintiffs’ bid. Thus plaintiffs were “overpriced”

on the only job they were specifically shown to have lost because they were too greedy, not because they could not buy tile from Flintkote. (And there was no showing that plaintiffs' greed would have been less if they could have obtained tile from Flintkote.)

Thus, it would seem that plaintiffs failed to get more business for one or a combination of the following reasons: (a) there was no more business to be done; (b) they didn't try to get more business; (c) although they could cut the price and still make a profit, no one would give them more business; or (d) they were greedy and did not get more business because they fixed their prices too high and free competition prevented them from getting more business. In any event, it should be clear that the evidence will not support a finding that plaintiffs lost any profits, or if they did, that such loss was proximately caused by their inability to purchase acoustical tile from Flintkote on a direct basis.

The foregoing discussion proceeds on the assumption, but without any concession, that plaintiffs' speculative estimates regarding their business prospects were properly admitted in evidence. If those estimates should have been excluded, it is even more apparent that there is no evidence to sustain a finding of the fact of injury through loss of profits.

It thus appears that there was evidence in the record which was sufficiently definite and certain to support a finding of the fact of injury in the form of two kinds of out-of-pocket expenses and to support a computation of the amount of damages sustained by reason of those injuries in any sum less than \$3,514.75 (the San Bernardino expenses, category (1), and the increased cost of tile, category (2), during the calendar year 1952). On the

basis of the court's instructions on the damage period (which were incorrect, see pages 100-09, *supra*), the evidence would support an award of damages based on plaintiffs' out-of-pocket expenses in categories (1) and (2) of not more than \$11,160.82, or, even accepting plaintiffs' obviously erroneous figures regarding the increased cost of acoustical tile, not more than \$14,678.54. But the jury's verdict assessed plaintiffs' damages at \$50,000, and it is thus apparent that the jury did not limit the award to damages for the injuries in categories (1) and (2).

The verdict must, then, have been based on an estimate of profits lost by reason of plaintiffs' inability to buy tile from Flintkote or on passion and prejudice. But both the fact and amount of lost profits could have been based only upon gratuitous speculation (either of plaintiffs or the jury). The verdict therefore cannot be permitted to stand.

“ . . . the basis of this judgment is nothing but the mere guess of an interested witness. Litigants cannot be permitted to estimate the money out of the coffers of their opponents in this reckless way.”

Central Coal & Coke Co. v. Hartman, 111 Fed. 96, 102 (8th Cir., 1901).

“The speculations and conjectures of witnesses who know no facts from which a reasonably accurate estimate can be made form no better basis for a judgment than the conjectures of the jury without facts.”

Ibid.

It is submitted that to permit this verdict to stand would, as this Court said in *Wolfe v. National Lead Company*, *supra*, be to

“give judicial blessing to a decision based upon speculation, surmise, and conjecture.” (225 F. 2d at 433-34.)

D. The Court Erred in Allowing an Excessive Attorney's Fee.

(Specification of Error No. 14, p. 43.)

After the trial of this case, the court fixed the fee of plaintiffs' attorney, as provided by 15 U. S. C. A. §15, in the sum of \$25,000 (R. 125-26). The matter of plaintiffs' attorney's fee had theretofore been submitted to the court on the basis of the petition for attorney's fees and costs (R. 105-108) and EXHIBIT A, Schedule of Time, appended thereto (R. 108-13), and memoranda of points and authorities submitted by both plaintiffs and defendant. No evidence other than that contained in the petition and exhibit was adduced in connection with the fixing of the attorney's fee. This Court has before it the same document, as the sole support for the award, as did the court below. No presumption of correctness, therefore, based on resolution of conflicts in evidence, or questions of relative credibility of witnesses, attaches to the trial court's decision. It is submitted that under the circumstances the fee of \$25,000 awarded by the court was excessive.

It is provided by statute that the “person injured” shall recover “the cost of suit, including a reasonable attorney's fee.”

15 U. S. C. A., §15.

The fee, therefore, is awarded to the successful plaintiff, not to his counsel. Hence there is no limitation, statutory or otherwise, on the private fee arrangements that a plaintiff may make with his counsel. But there is a limitation on the amount which may be awarded under the statute. The standard has been set by Congress: "a reasonable attorney's fee." A "reasonable" fee is generally held to be measured by the standard of fees ordinarily charged in the particular locality for the services rendered.

The amount to be allowed as attorney's fees may be determined from evidence admitted for that express purpose, the record of the trial, and the expert knowledge of such matters possessed by the trial judge. The award, of course, should take into consideration the result achieved as well as the work and skill of counsel.

But there are certain circumstances which clearly are not relevant factors to be considered in determining the amount of the award: (1) the amount may not be computed on the basis of a contingent fee; (2) the success or result achieved is the success reflected in the amount of actual damages, that is, as determined by the verdict, and not as trebled; (3) the usual yardstick of fees may not be disregarded in antitrust cases and an enhanced fee awarded upon any theory that such suits are of a unique character; (4) the fee should not be determined by application of a different standard simply because it is in effect to be paid by defendant rather than by counsel's client.

In short, in the matter of awarding attorney's fees, the court should be vigilant in detecting claims for exorbitant attorney's fees, and should strive to avoid what may be properly characterized as "vicarious generosity." Not

only does the award of an unreasonable attorney's fee inflict an additional and unauthorized penalty upon a defendant, but as said in *Milwaukee Towne Corp. v. Loew's, Inc.*, *supra*, at page 570 of 190 F. 2d, which language was quoted with approval in the *Brookside* case:

"And we are disturbed because in our sober judgment this exorbitant allowance, if it should become a precedent, is calculated to bring both the bar and the bench into public disrepute. More than that, the possibility that the anti-trust laws might develop into a racketeering practice should not be enhanced by the allowance of exorbitant and unreasonable attorney fees. It should not be made more profitable than it is for a person to become the victim of a conspiracy in restraint of trade."

The basic principles with regard to fixing the allowance to plaintiffs for their attorney's fee find ample support in the following cases:

Milwaukee Towne Corp. v. Loew's, 190 F. 2d 561, 569-71 (7th Cir., 1951), *cert. denied*, 342 U. S. 909, 72 S. Ct. 303 (1952);

Straus v. Victor Talking Mach. Co., 297 Fed. 791, 805-06 (2d Cir., 1924);

Twentieth Century-Fox Film Corp. v. Brookside Theatre Corp., 194 F. 2d 846, 858-59 (8th Cir.), *cert. denied*, 343 U. S. 942, 72 S. Ct. 1035 (1952);

Bordonaro Bros. Theatres v. Paramount Pictures, 113 F. Supp. 196 (W. D. N. Y., 1953);

Cf. Dumas v. King, 157 F. 2d 463, 466 (8th Cir., 1946);

Hutchinson v. William C. Barry, 50 F. Supp. 292, 296-98 (D. Mass., 1943).

Applying the rules set out in the authorities discussed above to the situation before us as disclosed by counsel's petition, it becomes immediately apparent that the award of \$25,000 as counsel fees was excessive.

There is no basis either in reason or authority by which the fee allowed can properly be enhanced, because counsel's arrangement with his own clients was for a contingent fee. It may well be that the allowance should be taken into account as between plaintiffs and their counsel, but the statutory award made here does not abrogate any private arrangement that plaintiffs and their counsel may have seen fit to make.

By stipulation, the fact and amount of the payment made by the other persons originally named herein as defendants were withheld from the jury; but, depending on the court's decision regarding the proper application of the \$20,000 payment, the recovery, before trebling, must be taken to be either \$30,000 or \$43,333.

Counsel's petition sets out 515½ hours of his time spent in the preparation and trial of the case, and a total of 21 days in court. His opinion that these services were of the value of \$40.00 per hour for office work and \$250.00 per day in court seems on the high side, but we are prepared to agree that \$30.00 to \$40.00 per hour and \$200.00 to \$250.00 for a court day for the services of senior members of the bar could probably be supported by testimony if local attorneys were called to give expert evidence. The court, however, is entitled to bring to bear its own judgment on these matters and would not be bound by these estimates.

One thing, however, must be borne in mind. There were only two days during the entire trial of this case

which were in fact full court days (that is, occupying both morning and afternoon sessions). There is some validity, we quite agree, to making a charge for a full court day if the attorney's time is so interrupted that no other productive work can be done on that day. But the "*per diem*" is put at an amount which presumably gives full compensation for the entire day's service and it seems quite untenable, as counsel has done here, to seek a full court day's allowance on each of the 15 days when only the afternoons were taken up and at the same time claim additional hourly compensation for the morning hours not spent in court. At least three effective working hours were available on each of those mornings, and if a full *per diem* is to be allowed for each court day, it seems too clear for argument that the hourly total should thereby be reduced by at least 15×3 , or 45 hours. It may also be suggested with propriety that there should be a further reduction to take into consideration that at least a substantial part of the services performed in the early stages of this case related to the prosecution of the case against defendants other than Flintkote.

Taking all of the factors into account, it is submitted that (assuming the judgment is affirmed) an allowance between \$15,000.00 and \$20,000.00 would be entirely adequate, and that anything more is unreasonable.

Of course, if the judgment is reversed on any ground, the award of attorney's fee should be set aside.

Paramount Film Distributing Corp. v. Village Theatre, 228 F. 2d 721, 727 (10th Cir. 1955.)

IV.

The Court Erred in Its Disposition of the Sum Paid to Plaintiffs by Former Defendants in Exchange for a Dismissal and a Covenant Not to Sue.

(Specification of Error No. 15, p. 43.)

This action was originally commenced against several defendants, in addition to The Flintkote Company (R. 3). Subsequent to the commencement of the action but prior to the trial of the case, all of the originally-named defendants other than The Flintkote Company paid to plaintiffs the sum of \$20,000.00 in exchange for a covenant not to sue and a dismissal of the action against them (R. 113). The fact of the payment of the \$20,000.00 and the effect of that payment as between plaintiffs and Flintkote were withheld from the jury and submitted to the court upon an oral stipulation, later formalized into a written stipulation, as follows:

“It Is Hereby Stipulated that the parties originally named as defendants herein, other than The Flintkote Company, paid to plaintiffs the sum of \$20,000 upon delivery to said defendants of a covenant not to sue, dated July 31, 1953, copy of which was attached to defendant’s Memorandum of Points and Authorities on Effect of ‘Covenant Not to Sue’ filed herein on May 4, 1955.

“Prior to the trial of the above-action, plaintiff and defendant The Flintkote Company agreed that said defendant would not offer before the jury evidence of said payment or of the execution of said document, and would withdraw its request for defendant’s proposed Instruction No. 49.

“This was done on the understanding that without prejudice to the rights and objections of either party and without prejudice to the right of either party to

appeal from or seek reconsideration of an adverse ruling, the Court shall determine, with the same effect, all issues that would have been presented if evidence of said payment, and said document, had been offered by defendant before the jury, and if said Instruction No. 49 had been proposed by defendant.

“It is expressly understood that any and all objections, jurisdictional or otherwise, to said offers in evidence or to proposed Instruction No. 49, and any and all arguments relating to the effect of said payment, are preserved unimpaired to plaintiffs, despite this stipulation, except the objection and argument that defendant waived any rights it otherwise would have had by not attempting to offer before the jury evidence of said payment or said document, or by withdrawing its request for said proposed Instruction No. 49.” (R. 113-114.)

No evidence other than the covenant not to sue (R. 95-103) and the stipulation reproduced above was submitted to the court in connection with its determination of the effect of the covenant not to sue and the payment of the \$20,000.00, so here again no presumption of correctness, based on resolution of conflicts in evidence or questions of credibility of witnesses, attaches to the trial court's decision. The judgment provided that:

“ . . . the defendant shall have as a credit against the portion of this judgment relating to damages in the sum of \$150,000 the sum of \$20,000 heretofore received by plaintiffs in these proceedings pursuant to the terms of a covenant not to sue between plaintiffs and other parties formerly defendants in this case” (R. 126-27).

In this connection the court also issued its Memorandum of Decision (R. 116-124),

Lysfjord v. Flintkote Company, 135 F. Supp. 672 (S. D. Cal. 1955).

It is submitted that the court erred in its determination of the effect of the \$20,000.00 paid, and that in fact the \$20,000.00 offset the actual damages suffered by plaintiffs and should have been deducted from the verdict prior to the trebling thereof by the court.

Co-conspirators are of course joint tort-feasors and it is settled that private actions under the antitrust laws sound in tort. See, *e. g.*,

Rector v. Warner Bros. Pictures, 102 F. Supp. 263, 264 (S. D. Cal. 1952).

The general rule on the effect of payments made by one joint tort-feasor to the injured person is stated in Section 885(3) of the Restatement of Torts, as follows:

“Payments made by one tortfeasor on account of a harm for which he and another are each liable, diminish the amount of the claim against the other whether or not it was so agreed at the time of payment and whether the payment was made before or after judgment; the extent of the diminution is the amount of the payment made, or a greater amount if so agreed between the payor and the injured person.”

See also,

Schumacher v. Rosenthal, 226 F. 2d 946 (7th Cir. 1955);

Southern Pacific Co. v. Raish, 205 F. 2d 389, 393 (9th Cir. 1953);

Pacific States Lumber Co. v. Bargar, 10 F. 2d 335, 337 (9th Cir. 1926).

The rule is usually stated to the effect that a plaintiff's damages are reduced *pro tanto* by any sums received from a joint tort-feasor. See, *e. g.*

Husky Refining Co. v. Barnes, 119 F. 2d 715, 716 (9th Cir. 1941);

McWhirter v. Otis Elevator Co., 40 F. Supp. 11, 13 (W. D. S. C. 1941).

It is thus clear that defendant is entitled to receive credit for the \$20,000.00 heretofore paid by the former defendants in this case as consideration for the covenant not to sue. The issue is whether that credit should be allowed against the judgment after trebling the jury's verdict or against the verdict before trebling.

The statute under which this action was brought reads in pertinent part as follows:

"Any person who shall be injured in his business or property . . . may sue therefor . . . and shall recover threefold the damages by him sustained . . ."

The word "damages" in the above quotation refers of course to actual damages sustained by the person injured.

Cape Cod Food Products v. National Cranberry Ass'n, 119 F. Supp. 900, 910-11 (D. Mass. 1954).

The real question, then, is the extent to which plaintiffs were damaged in light of their receipt of the \$20,000.00. Flintkote contends that (accepting the jury's verdict) plaintiffs' damages were only in the sum of \$30,000.00, and that only that sum should have been trebled by the court.

Defendant's position is supported by clear analogy by
Clabaugh v. Southern Wholesale Grocers' Ass'n,
181 Fed. 706 (N. D. Ala. 1910).

That was an action for treble damages under the anti-trust laws. An action had previously been brought in the state court based upon the same allegedly wrongful acts against the president of the defendant association for alleged wrongful interference with plaintiff's business. Plaintiff settled the state suit while the federal action was pending. The federal court granted a motion by the defendant association for a directed verdict, relying upon the rule that the association and its president were joint tort-feasors and that a party wronged by joint tort-feasors was entitled to but one satisfaction for his injuries. The court found that the settlement effected in connection with the state court suit was intended to be in full satisfaction of plaintiff's damages. The following are significant portions of the opinion:

" . . . Mr. Clabaugh had no right to sue anybody else, even though he attempted to reserve that right in his agreement with Mr. Van Hoose, because, having once been paid in full for his damages, he had not the legal right to make any agreement which would give him a right to sue any other person for the same damages, . . . " (p. 707.)

* * * * *

"There is one other thing which I should have said. The act of Congress under which this suit is brought provides for the recovery, not of single damages, but threefold damages; but the construction of that act by the Supreme Court in the case of *Montague & Co. v. Lowry*, 193 U. S. 38, 24 Sup. Ct. 307, 48 L. Ed. 608, is to the effect that threefold damages are only recoverable when the plain-

tiff has a cause of action that would entitle the jury to award single damages. In other words, the function of the jury is to only render a judgment for actual damages, and the court then triples them; but if there is nothing to go to the jury for single damages, then the court has no jurisdiction to render any judgment for triple damages." (p. 708.)

Flintkote does not contend that the \$20,000.00 was intended by any of the parties to the covenant not to sue to be in full satisfaction of plaintiffs' claims. It was clear, however, that the payment was intended as partial compensation for such damages as plaintiffs might have sustained by reason of the matters complained of in the first amended complaint in this action. The language of the covenant not to sue pertinent in this connection is as follows:

"That the sum of Twenty Thousand Dollars (\$20,000.00) paid herein to the covenantors as consideration for the execution of this covenant not to sue does not represent to covenantors and shall not be construed as full compensation for the alleged damages claimed to have been suffered by the covenantors in their original complaint and in their first amended complaint, but is only partial compensation therefore, and it is understood and agreed that the covenantors do not in any manner or respect waive or relinquish any claim or claims against any other persons, firms, or corporations than those expressly named and designated herein, . . ." (R. 99-100.)

* * * * *

"That nothing herein set forth is intended to mean nor to be construed as any admission of liability on the part of any of the covenantees with respect to any of the matters alleged in the complaint and the first amended complaint." (R. 101.)

The aforesaid language is free from any uncertainty or ambiguity and it is clear that the \$20,000.00 was intended to be and was partial compensation for such damages as plaintiffs might have sustained. It should follow that plaintiffs' damages were reduced *pro tanto* by \$20,000.00 and that the jury's verdict should have been similarly reduced before the same was trebled by the court.

Conclusion.

The judgment of the District Court cannot stand.

It should be reversed and judgment should be entered for appellant since there was no evidence to justify the verdict.

In any event, a new trial should be granted because of the many prejudicial errors of the court below.

The damages awarded are grossly in excess of any amount supported by the record. In view of the great disparity between the evidence and the jury's award, the failure to grant a new trial was an abuse of discretion.

Respectfully submitted,

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May 25, 1956.

No. 15005.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

THE FLINTKOTE COMPANY, a corporation,

Appellant,

vs.

ELMER LYSFJORD and WALTER R. WALDRON, doing business as aabeta co.,

Appellees.

An Appeal From the District Court of the United States, for the Southern District of California, Central Division.

APPELLEES' BRIEF.

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FILED

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The first of these is the fact that the
 government has been unable to
 maintain a stable currency. This
 has led to a loss of confidence
 in the government and a
 consequent loss of support
 from the people. The second
 is the fact that the government
 has been unable to maintain
 a stable economy. This has
 led to a loss of confidence
 in the government and a
 consequent loss of support
 from the people. The third
 is the fact that the government
 has been unable to maintain
 a stable society. This has
 led to a loss of confidence
 in the government and a
 consequent loss of support
 from the people.

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No. 15005.

IN THE

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THE FLINTKOTE COMPANY, a corporation,

Appellant,

vs.

ELMER LYSFJORD and WALTER R. WALDRON, doing business as aabeta co.,

Appellees.

APPELLEES' BRIEF.

An Appeal From the District Court of the United States, for the Southern District of California, Central Division.

Jurisdictional Statement.

Appellant's jurisdictional statement is correct except for its parenthetical allegation that appellees abandoned their claim for damages under the monopoly section of the Act (15 U. S. C. A. 2).

Statement of the Case.

Because appellees are unable to accede to either the accuracy or adequacy of the appellant's Statement of the Case, the following analysis of the pleadings and Statement of the Case are respectfully submitted:

The following references in appellee's Brief shall have the following meanings:

"aabeta co." shall refer to the fictitious name of appellees' business entity or jointly to both appellees;

“Lysfjord” shall refer to appellee Elmer Lysfjord;
“Waldron” shall refer to appellee Walter R. Waldron;

“Contractor Defendants” or “defendant contractors” shall refer to all other named co-conspirators;

“Association” shall refer to the defendant Acoustical Contractors Association of Southern California, Inc.

Individual contractor defendants may sometimes be referred to by an abbreviation, such as Reeder for L. D. Reeder Company; Coast for Coast Insulating Products Company; Krause for Gustave Krause; Howard for R. E. Howard. Individual officers and agents of Flintkote will in like manner be referred to as Harkins for Frank S. Harkins; Heller for Robert William Heller; Lewis for Sidney M. Lewis; McAdow for Harold H. McAdow; Ragland for Robert Eugene Ragland; and Thompson for E. F. Thompson.

The First Amended Complaint.

(Hereinafter referred to as the Complaint.)

Walter R. Waldron and Elmer Lysfjord, the appellees, operating under the style name of “aabeta co.,” were engaged in the business of purchasing, selling, and installing acoustical tile in the Counties of Los Angeles and San Bernardino, and elsewhere in the State of California [R. 18-19]. The defendants were seven corporate competitors of plaintiffs, a trade association, the Flintkote Company, and eight individual defendants who were officers or managing agents of the competing corporate contractor defendants and the defendant association [R. 19-23].

Acoustical tile, as used in the Complaint, refers to a sound deadening material used on the walls and ceilings of public and private buildings which has been tested and has received a sound absorbing rating and approval by the Acoustical Materials Association (hereinafter referred to as A. M. A.) as having definite and ascertained sound

absorbing qualities [R. 23-24, 190-191]. During the period of time covered by this action and for many years prior thereto building specifications have required the use of acoustical tile carrying an A. M. A. approval or rating [R. 190-191, 193, 837]. During the same period of time all manufacturers of such tile sold their product directly to a limited number of acoustical tile contractors in the Los Angeles area, consisting solely of the contractor defendants herein [R. 1044; Exs. 12-13, App. Op. Br. p. 3], at identical and substantially lower prices than such tile could be obtained through middlemen jobbers or wholesalers [R. 270-273; Ex. 9]. Manufacturers do not place geographical limitations on their distributor outlets [R. 934; Ex. 11]. Substantially all A. M. A. approved tile sold and distributed for use in private and public buildings in the State of California is manufactured by a limited number of manufacturers in states other than the State of California and in the Territory of Hawaii. The defendant Flintkote manufactures such tile at Hilo, Territory of Hawaii, and sells and consigns it directly to the defendant contractors in the State of California as aforesaid [R. 24-26, 41-43, 1044, Ex. 9, App. Op. Br. p. 3].

Briefly stated, the Complaint charges the defendants with combining and conspiring among themselves and with others to restrain and monopolize the sale, purchase, installation, and distribution of competitive acoustical tile in the southern area of the State of California and elsewhere, and that in order to perpetuate this conspiracy and monopoly, the defendants, including the defendant Flintkote, conspired to, and in fact did, destroy appellees' acoustical tile contracting business by agreeing among themselves to deprive and by depriving appellees of their only available source of supply for the purpose and with the result of monopolizing all such sources of acoustical tile in the hands of the defendant contractors,

The Complaint charges that the purposes of the conspiracy were as follows:

(a) To maintain, adhere to, and perpetuate non-competitive prices, terms, and conditions of purchase of acoustical tile from manufacturers by defendant contractors and to protect and perpetuate an existing non-competitive price fixing and business allocation scheme and device existing among the defendant contractors in the general Los Angeles area of the State of California.

(b) To eliminate competition in the sale and installation of acoustical tile in public and private construction works in said area.

(c) To thus obtain high, non-competitive, and exorbitant prices for the sale and installation of acoustical tile in said area.

(d) To exclude all competition with the defendant contractors.

(e) To obtain a practical control and monopoly over the purchase, sale and installation of acoustical tile in said area;

(f) To deprive the public generally of the benefits of a competitive market in the expenditure of the public and private funds for schools, hospitals, offices, and other types of public and private construction in said area [R. 29-31].

The defendants are alleged to have done the following acts in furtherance of the conspiracy to restrain and to monopolize:

a. Conspired to restrain and monopolize interstate and foreign commerce in the sale and installation of acoustical tile in the Counties of Los Angeles and San Bernardino, California.

b. Agreed among themselves and with Flintkote to limit the sale of A. M. A. approved tile to the defendant contractors.

c. Allocated among the defendant contractors contracts for the installation of acoustical tile in schools, hospitals, and other public and private buildings pursuant to a collusive agreement among themselves whereby members of the defendant Association decided in advance of the filing of bids which member was to get a particular job and whereby all other members arbitrarily bid a higher figure to ensure this intended result.

d. By such means substantially increased the cost of public and private building projects for their own exclusive benefit and profit and to the detriment of the public generally.

e. Precluded any substantial competition in the sale and installation of acoustical tile in said area by knowingly monopolizing all available competitive sources of acoustical tile in defendant contractors.

f. The defendants (including Flintkote) agreed among themselves to destroy the plaintiffs' acoustical tile contracting business "for the sole purpose and with the sole intent of preventing plaintiffs from competing in the acoustical tile contracting business in the Counties of Los Angeles and San Bernardino, State of California, or in other areas in which the defendant acoustical tile contractors conducted such business for the purpose and with the result of thereby preserving the non-competitive price fixing and allocation scheme among the defendant contractors.

g. The defendants, and each of them, including the defendant Flintkote, agreed to terminate the supply of competitive acoustical tile products to plaintiffs pursuant to the conspiracy with Flintkote, and did in fact terminate plaintiffs' supply of competitive A. M. A. approved tile for the sole purpose and effect of preventing plaintiffs from competing with defendant contractors and to protect and perpetuate the existing monopoly in the sale and in-

stallation of acoustical tile theretofore existing among the members of the defendant association.

h. The defendant Flintkote entered into said conspiracy with the other defendants with full knowledge of and for the express purpose and effect of foreclosing plaintiffs' competition, and for no other reason [R. 31-35].

As a result of the foregoing conspiracy and monopoly appellees' acoustical tile business has been injured and substantially destroyed by reason of the fact that they have been deprived of an assured source of supply of competitive acoustical tile at competitive prices, and appellees are for this reason unable to bid competitively on any substantial contract, all of which has resulted in loss of actual and potential profits, in loss of good will between appellees and their established general contractor customers, in the loss occasioned by capital and business expenditures made in reliance upon a steady and continuing source of Flintkote acoustical tile and in other ways [R. 35-37].

Prior to the introduction of evidence at the trial the principal controverted issues were concisely defined in the opening statements of counsel and in appellant's Answer to the Complaint. Thus, appellant's counsel in his opening statement admitted that the general nature of the product and the number of people engaged in the industry were not in dispute [R. 183]; that the principal or only defense of FLINTKOTE was that in terminating appellees' source of supply of competitive acoustical tile it had acted independently and as a matter of sound business judgment [R. 185]; and *that Flintkote did not deny there were complaints made by other acoustical tile contractors that plaintiffs were competing with them on the same line of tile* [R. 185].

To justify this alleged "independent business judgment" Flintkote was reduced to the contention that plaintiffs were given only a limited right to sell and apply Flint-

kote tile in the Counties of San Bernardino and Riverside where the defendant contractors did not operate [R. 45-46, 184-185]. Under agreed instructions to the jury by the Court the jury by its verdict repudiated this contention and found for plaintiffs. With the foregoing in mind, the evidence adduced at the trial and the inferences properly to be drawn therefrom become particularly significant.

By agreement of counsel the Court, prior to the introduction of evidence, called the pertinent sections of the antitrust statutes to the jury's attention and carefully explained that the action was not based upon contract, but upon the antitrust laws of the United States [R. 185-187].

Again at the conclusion of the trial and after having previously instructed to the same effect, the Court expressly instructed the jury on the principal defense of appellant that:

“The Flintkote Company can be liable for refusing to sell acoustical tile to plaintiffs only if such refusal to sell was in furtherance of and as a consequence of a knowing participation in an unlawful combination and conspiracy.”

“In other words, we come back to the old principle that if the Flintkote Company was acting entirely on its own, without conspiracy with the other defendants, then there is no cause of action” [R. 1247].

By its verdict and under the instructions of the Court, the jury found that the defendant Flintkote eliminated the competition of plaintiffs “in furtherance of and as a consequence of a knowing participation in an unlawful combination and conspiracy.”

At the end of the entire charge counsel for appellant signified their approval of the instructions as given with the single exception of their proposed Instruction 46A through 47F relating to the question of measurement of damages [R. 1224-1227, 1230-1231, 1259].

Evidence of the Conspiracy and Monopoly.

The seeds of the conspiracy and monopoly charged in the Complaint were sown in the basic distribution policy of the manufacturers and in the resultant monopoly of A. M. A. rated acoustical tile in the hands of the defendant contractor outlets constituting the membership of the defendant Association. During the period covered by the instant action and prior thereto all acoustical tile having an A. M. A. rating was manufactured by the following acoustical tile manufacturers, none of whom had their manufacturing facilities in the State of California, and who sold their tile directly in carload lots to the aforesaid defendant acoustical tile contractors on what is known as a "split distribution system" whereby two manufacturers used the same contractor as an outlet for its tile. Thus, the system worked as follows with the knowledge and approval of the manufacturers and the contractor defendants [R. 1086-1089, 1141-1142]:

<i>Sources of Supply of</i>	
<i>Acoustical Tile Contractor</i>	<i>A. M. A. Tile.</i>
R. E. Howard Company	U. S. Gypsum and Flintkote
Sound Control	National Gypsum and Flintkote
Coast Insulating Products Co.	Simpson Logging Company and Flintkote
R. W. Downer Co.	Armstrong Co. and Firtex
L. D. Reeder Co.	Armstrong Co.
Paul Denton Co.	Armstrong Co. and Flintkote
Acoustics, Inc.	Firtex-Flintkote
Harold E. Shugart Co.	Celotex

The only other line of A. M. A. tile which is sold in the area is manufactured by the Johns-Mansville Company who sell and install their own tile [R. 190-193, 780-781, 837, 841-847, 981, 1011, 1075-1082, 1088-1089, 1123].

The great bulk of acoustical tile installed in both public and private construction projects consists of 12" x 12" squares of 1/2" thickness and 12" x 12" squares of 3/4" thickness. Of these two sizes the majority of installed tile is of the former size, both sizes being sold by manufacturers at identical prices [R. 272-273].

Aside from the uniform and parallel action of the manufacturers with respect to the price of tile [R. 272-273], it is clear from the record that most manufacturers acquiesced in the split distribution system by knowingly permitting its distributors to duplicate its product with that of an otherwise competing manufacturer.

Premised upon this monopolistic type of distribution system, the defendant contractors, commencing as early as 1950, took steps to eliminate competition among themselves in the sale and installation of acoustical tile in public and private buildings in the Southern California area [R. 302-307]. These defendants retained an estimator or accountant for the purpose of enforcing uniform methods of figuring bids among the defendant contractors, and to stabilize and enhance the price received by such contractors on acoustical tile installations [R. 307, 310, 1020-1028]. For purpose of enforcing this restraint of competition among acoustical tile contractors, it was agreed that the low bidder on each job would be disqualified in favor of the next lowest bidder. After a series of organized meetings among the contractor defendants [R. 1019-1028] their loose organization was incorporated into the defendant Association named in the Complaint in the year 1951. Both prior and subsequent to the incorporation of the latter defendant, the defendant contractors extended their price fixing activities to include arbitrary allocation of acoustical tile contracts among the

members of the Association [R. 309-310]. In the operation of this bid allocation scheme the contractor to whom a particular job had been allotted submitted his bid price in advance to all competing contractor defendants who in turn would enter a bid a certain percentage above that submitted by the contractor to whom the bid had previously been allotted. Thus, for example, the R. W. Downer Company upon receiving the proposed bid on a job which had been allotted to the R. E. Howard Company would take the Howard Company's figures and arbitrarily raise the Downer bid on the same job by $7\frac{1}{2}\%$. The other "competing contractors" would raise their bids above the Howard bid in the amount of other and different percentages [R. 310-335, 366-368, 493-524, 641-647, 672-673, 677, Exs. 18-29].

Appellees' Entrance Into the Acoustical Tile Contracting Field.

The appellees, Waldron and Lysfjord, were both experts in the acoustical tile contracting business. Appellant did not challenge this fact. Waldron had been associated with this business for approximately 20 years—Lysfjord for 12 years [R. 436-437, 661, 683, 694]. Their experience included the actual manual application of acoustical tile, the computing and submission of bids to general building contractors for acoustical tile installations, long years of experience in selling acoustical tile installations for two or more of the defendant contractors, the building of good will between appellees and their general contractor customers, and technical studies in sound control problems [R. 188-196, 208-209, 272-273, 335-336, 350-352, 402-403, 435-437, 442, 447-448, 641, 644-647, 659-660, 694, 706-707, 780, 826-827, 830]. In about June of 1951 their old friend in the acoustical tile field, Robert Rag-

land, became the Chief Promotional Man for Flintkote tile in this area [R. 779]. With a friend in court, so to speak, appellees immediately applied to Ragland for a line of Flintkote acoustical tile. Knowing the capabilities and experience of appellees and because Ragland felt they would enhance the sale of Flintkote tile, he desired them "on Flintkote's team" [R. 441-443, 826-827, 830, 834, 856-858]. Ragland accordingly, in about September of 1951, and after numerous discussions with appellees, arranged a meeting between himself, appellee Lysfjord, and his immediate superior at Flintkote, Mr. Baymiller [R. 443-445]. At this meeting Lysfjord reviewed appellees' experience in the acoustical tile field with Baymiller, including the fact that he had regularly been successful in obtaining contracts for the installation of large amounts of acoustical tile from many of the outstanding general contractors in the Los Angeles area. He named some of these contractors. Baymiller was impressed with appellees' ability and experience [R. 858-859, 943], and the meeting broke up with the assurance from Baymiller that a subsequent meeting would be called to further discuss the matter of appellees obtaining a regular supply of Flintkote tile [R. 445].

Approximately two weeks later a second meeting was arranged by Ragland and was attended by both of the appellees, by Ragland, Baymiller, and a Mr. Thompson, sales manager for all Flintkote building materials in the Southwestern area [R. 446]. At the prior meeting Baymiller had suggested that appellees bring to this meeting a portfolio of contracts to demonstrate to Thompson their ability to obtain business from general contractors in the Los Angeles area. This was done, and appellees again reviewed their experience and ability in the acoustical tile

contracting field in the Los Angeles area [R. 447-448]. At this meeting Thompson was also impressed by appellees and by the type and volume of acoustical tile contracts they had been accustomed to negotiate in the past [R. 858-859, 943, 1031]. Thompson at this meeting expressed his pleasure at this large volume of sales and inquired of appellees as to whether or not they felt they could continue selling these general contractors in the event Flintkote approved them as a dealer. Thompson also expressed his pleasure that appellees would handle only Flintkote tile [R. 847, 857-860, 866, 1031]. Thompson then expressed his own desire to have appellees "on Flintkote's team," Waldron warned Thompson that the established contractors in the field were not competing with each other for jobs, and would, therefore, object very strenuously to someone entering the field who would give them active competition [R. 979]. Thompson assured appellees they need have no fears on this score in the event Flintkote decided to give them its line of acoustical tile [R. 449-450]. At this meeting and probably at the prior meeting with Ragland and Baymiller appellees were asked if they would be willing to solicit business in San Bernardino County and Riverside County in addition to the Los Angeles area in the event they were given the Flintkote line [R. 449-450]. Thompson felt sure Flintkote would sell appellees tile if they would expend some effort in San Bernardino County in addition to the Los Angeles area, but that the final decision would lie with Mr. Harkins, the General Manager of Flintkote for the 11 Western states [R. 450-451].

In order to facilitate the final approval of appellees as Flintkote dealers they were asked to prepare a financial

statement and bring it to a meeting which would be arranged at the Flintkote offices [R. 450-451].

A few days later appellees were requested to come to the Flintkote offices for this final meeting and to bring their financial statement with them. When they arrived they were met by Ragland and Thompson, were congratulated, and were taken into Harkins' office [R. 451, *et seq.*]. After introductions Harkins congratulated appellees upon their becoming Flintkote acoustical tile contractors. Harkins was shown appellees' financial statement and *noted particularly* that portion of the statement wherein appellees projected their operations into the future [Ex. 44, p. 6]. (On the witness stand Harkins physically pointed out this portion of Exhibit 44 and stated he made particular note of it [R. 1073-1074]. Exhibit 44 indicated appellees' assets were approximately \$50,000.00.)

On the cover of this financial statement there appeared the name of appellees' company "aabeta co." and in capital letters the address of appellees' place of business "Los ANGELES" [R. 874-879]. That portion of Exhibit 44 to which Harkins paid particular attention [R. 1061] likewise listed the address of appellees' business as "Los ANGELES" [Ex. 44]. At this meeting Harkins called appellees' attention to a large building project near Pomona and told them that Flintkote had sold a tremendous amount of roofing material to be installed on that job. He urged appellees to "sharpen their pencils" and go after the substantial amount of acoustical tile which was to be installed in the same job [R. 451-458, 921-922]. Pomona is, of course, in the Los Angeles trading area.

All of the foregoing occurred prior to the end of 1951 and immediately after the Harkins' meeting appellees resigned their assured and lucrative association with the defendant Downer. Lysfjord was requested by Downer to devote a part of his time for two or three weeks in order to process certain outstanding acoustical tile contracts which he had theretofore negotiated and turned over to Downer for installation. Downer at this time also tried to induce Lysfjord to remain with Downer by offering him a guaranteed minimum sales commission of \$1500 per month [R. 662, 829, 830]. Appellees' testimony shows their sales for Downer involved sales in excess of one carload of tile per month. This was confirmed by Ragland and is otherwise not in dispute in the record.

The approval of Harkins and McAdow of Flintkote of appellees' Financial Statement [Ex. 44] would seem in itself sufficient to rebut appellant's unfounded innuendo relating to any reference to appellees' inability to compete through lack of financial backing as well as any contention that appellees were restricted to San Bernardino in their operations.

Activities of Appellees Upon Becoming Accredited Flintkote Dealers.

The record as a whole makes it abundantly clear that Flintkote's entire defense was based upon the fact that it acted independently in terminating appellees' only source of competitive acoustical tile for the sole alleged reason that appellees were doing business in the Los Angeles area contrary to an alleged understanding with Flintkote to restrict their operations to San Bernardino and Riverside Counties. Flintkote repeatedly stated through the mouths of their counsel and own witnesses that the only question involved was whether or not appellees were doing business in the Los Angeles area and that this alone was the reason for terminating appellees' source of supply [R.

992-993]. Yet, under questioning no witness for Flintkote was ever able to explain why if this was the reason Harkins, Thompson, Lewis, Baymiller, Heller, or Ragland did not utilize the simple expedient of asking appellees a simple question directed to this point until after all said individuals arranged for and attended numerous meetings with the contractor defendants at which appellees' competition with them was discussed.

The activities of appellees at this point further confirm the jury's verdict to the effect that the termination of appellees' source of supply of acoustical tile was solely the result of the conspiracy to drive appellees out of business, and that it was in no wise connected to the belated and obviously untenable excuse that this act was based upon a violation of Flintkote's agreement with appellees. Thus, commencing immediately after their meeting with Harkins of Flintkote, appellees commenced organizing their acoustical tile contracting business known as the "aabeta co." [R. 202]. On or about December 1, 1951, they obtained and occupied warehouse and office space situated on Atlantic Avenue in the City of Los Angeles [R. 203]. On December 15, the lease on this location was formally executed [Ex. 2, R. 204]. It was not until approximately thirty days after appellees had occupied the Los Angeles address that they entered into a lease for warehouse space in the San Bernardino area [Ex. 3, R. 205]. They likewise arranged for the printing of stationery and business cards for the aabeta co. [Ex. 4] which listed both the Los Angeles and San Bernardino addresses and telephone numbers of the aabeta co. [Ex. 4, R. 206]. The original sketch of this stationery was exhibited to Ragland who furnished the Flintkote emblem appearing on this stationery [Ex. 4, R. 459-460, 903-904]. Appellees also arranged for the publication of the fictitious business name of aabeta co., *first in Los Angeles* on January 11, 1952 [Ex. 5, R. 211], and *approximately a month later* in the County of San Bernardino [Ex. 6, R. 213].

Shortly after they became accredited Flintkote dealers-appellees actively solicited business from general contractors in the Los Angeles area [R. 216-217]. One of appellees' first jobs in the Los Angeles area was referred to them by Ragland of Flintkote. This job called for installation of acoustical tile in the offices of Owens Roofing Company in Los Angeles [R. 219]. Appellee Waldron estimated the Owens Roofing Company contract on aabeta co. stationery which listed the Los Angeles address and telephone number of aabeta co. [Ex. 4, R. 219-222].

Shortly after appellees had occupied their office and warehouse at Atlantic Avenue in the City of Los Angeles, Ragland, the acoustical tile promotion executive for Flintkote, came to their place of business there and advised appellees to place immediately an order for a carload of acoustical tile because of the fact that Flintkote's manufacturing facilities in the Territory of Hawaii were going to be closed for repairs [Ex. 46, R. 884-889]. Appellees placed this order on an ordinary order blank and gave it to Ragland at the appellees' Atlantic Avenue address in the City of Los Angeles [R. 223-224]. This original order was shipped from Hawaii on January 4, 1952 [Ex. 8]. McAdow, Flintkote's credit manager, examined Exhibit 44 very carefully at the time he accepted this original appellees' order, "he is a very cautious man in credit matters" [R. 1115-1116, 1120-1121]. Yet, both Harkins and the cautious McAdow premised their whole defense (as did appellant's counsel) upon the single fact that Flintkote had not authorized appellees to conduct their business in the Los Angeles area and knew nothing of their activities there. Their appeal to this Court is based upon the same proposition; *i. e.*, that there is no evidence to rebut this defense. The evidence is not in dispute that the Hilo plant did in fact close in accordance with Ragland's representations [Ex. 48, R. 894-898].

Flintkote's invoice for this original order of tile [Ex. 8] contained a delivery address in San Bernardino belonging to the California Decorating Company with which Waldron had an indirect association. This address was used because there was not sufficient room in appellees' Los Angeles warehouse to store a full carload of tile, and no facilities had been obtained at that time in San Bernardino [R. 222-228].

During the period between the Harkins' meeting in December, 1951, and February 19, 1952 (the date of termination), Ragland visited appellees at their Los Angeles office and warehouse approximately 24 times [R. 228]. During these visits he referred and called appellees' attention to other possible acoustical tile contracts in the Los Angeles area, including one at the Lido Hotel and cocktail lounge in Los Angeles [R. 229].

Flintkote during this same period also referred a request for bids for acoustical tile from the University of California which had been mailed directly to Flintkote [Ex. 9]. This request was mailed by Flintkote to the Los Angeles office of the aabeta co. [R. 230]. During Ragland's visits he also gave a list of all general contractors in the Los Angeles and San Bernardino areas to appellees for their general information. Ragland also checked certain names of general contractors in the San Bernardino area with whom he was personally acquainted [Ex. 10, R. 233-234] and with whom neither appellee had an acquaintance.

Appellees' activities in the acoustical tile contracting field became generally known to their competitors when they succeeded in obtaining a number of substantial contracts for the installation of acoustical tile in the Los Angeles area. At no time prior to the termination of their source of supply did appellees obtain or perform a contract other than in Los Angeles. The defendant Howard was vague as to how this knowledge came to him,

but stated it could have come from one of his salesmen or from one of the other acoustical tile contractors—possibly from the defendant Downer. In any event he called either Baymiller or Heller about appellees' competition [R. 1149-1150, 1153, 1155]. The defendant Krause, manager of the defendant Coast, stated that the matter came to his attention when appellees were successful in taking a contract away from Coast upon which the latter company had done considerable work and on which it had entered a bid [R. 1124]. The defendant Hoppe, owner of defendant Sound Control, learned of appellees' competition in much the same manner and discussed such competition with other defendant contractors [R. 1011]. Immediately upon losing this substantial contract to appellees, Krause called Mr. Sidney Lewis, assistant to Harkins at Flintkote [R. 1124]. Krause testified that he was naturally upset to find a new competitor in the market; that Lewis "became quite heated" and his conversation with Lewis "ended up by his telling me (Krause) to go to Hell. I will never forget that. I know that to be a fact" [R. 1125].

Krause called Lewis two or three times and insisted that Flintkote take immediate steps to stop appellees' competition [R. 1046-1048, 1050]. Hoppe of Sound Control made his objections to Flintkote concerning appellees' competition through Krause [R. 1050]. During the conversation with Lewis, Lewis told Krause that Flintkote had a right to open up or close down any distributor they wanted to [R. 1126]. In the same conversation Krause wanted an immediate meeting between Flintkote officials and the acoustical tile contractors [R. 1065, 1067, 1143]. Lewis told him Flintkote would not participate in such a meeting and Harkins affirmed this alleged stand by Lewis [R. 1064-1065, 1067, 1090-1091, 1099]. "There was a lot of commotion about it" [Appellees' competition, R. 1064]. Howard also called Flintkote about appellees'

competition [R. 1149-1150]. Flintkote's refusal to comply with Krause's request for a meeting is significant in view of the following facts:

Immediately after Krause made his demands known to Lewis the latter dispatched Baymiller and Heller (two Flintkote officials) to the offices of Coast where they met and discussed appellees' business activities with the defendants Krause and Newport [R. 949-951, 1125]. At this meeting Baymiller also "lost his temper in Mr. Newport's office and said that Flintkote had a right to their own business and they could handle it or see fit to give out any distributorship, franchises, or take any away they wanted. And Mr. Baymiller and Mr. Newport both parted feeling pretty hot" [R. 1128]. Also at this meeting there was no mention made or reference to appellees' business activity in any particular area. *There was only the general objection by Krause and Newport to appellees' operation in any area* [R. 1139]. Both Baymiller and Heller were incensed over the fact that an acoustical tile contractor should tell Flintkote how to run its business [R. 1141-1142]. Krause did not deny Lewis' testimony that he had told Lewis he wanted Flintkote to take immediate steps to stop appellees' operations and admitted he was very angry about appellees' competition with the other contractors in the area [R. 1143]. Shortly after the meeting between Newport, Krause, Baymiller and Heller, Ragland was told by Baymiller to pay another visit to placate the contractors [R. 952, 1144]. Krause testified that at this second meeting Ragland merely denied he was personally responsible for putting appellees in business and said that it was Harkins' decision that enabled appellees to obtain Flintkote tile [R. 1146]. At about the same time Baymiller, Heller, and Ragland were conferring with the competitors of appellees Harkins, the principal officer of Flintkote for the entire eleven western states, was also meeting and conversing with these same competitors. He

personally called the defendant Newport and asked him to lunch at the Brown Derby Cafe in Los Angeles to discuss appellees' competition [R. 1065-1066, 1091-1092]. Baymiller and Heller went immediately from the offices of Coast to the offices of the defendant Sound Control where they met not only the defendant Hoppe of Sound Control, but also found the defendant Howard of the defendant Howard Company waiting for them [R. 951]. It is also significant that Krause of Coast knew all about this latter meeting and continued to "needle" Flintkote about appellees' competition [R. 1130]. Howard had previously called Flintkote on the phone to complain of appellees' competition [R. 270, 1149-1150].

Hoppe was obviously expecting the call, as was Howard. Hoppe admits that he talked to other contractors regarding appellees' operations, and that they were not happy about it—they "never welcome" new competition [R. 1010-1011, 1017-1018]. Howard refused to say whether he had been asked to be at Sound Control's offices [R. 1151].

Howard testified that when he talked to Baymiller and Heller at Sound Control's offices, Baymiller did not commit himself as to whether plaintiffs should or should not be in San Bernardino or whether Flintkote would or would not restrict them there or what Flintkote would do [R. 1157-1158]. It was obviously apparent to the jury from the foregoing and other facts that at this point Flintkote was faced with the dilemma of acting legally and independently as it had done when they appointed appellees as Flintkote dealers, or agreeing with appellees' competitors to put appellees out of business in order to preserve the non-competitive situation then existing in the industry. The untenable and improbable nature of appellant's position is further illustrated by a comparison of the statements of its witnesses with what was actually done. After Lewis (the second in command at Flintkote) is alleged to

have emphatically informed Krause that Flintkote had the right to sell acoustical tile to appellees, and after allegedly refusing to attend a meeting of the acoustical tile contractors he nevertheless immediately substituted for such meeting a series of meetings between appellees' competitors and various officials of Flintkote for the same purpose and with the same effect and which conclusively negate any "independent business motives" of Flintkote. Thus, while Lewis would not permit Krause, Baymiller, Howard, Hoppe, and other competing contractors to call a formal meeting of protest, Lewis sent Baymiller and Heller to discuss appellees' competition with the same individuals. Baymiller sent Ragland to cover the same ground which he and Heller had previously covered [R. 990], and at the same time Mr. Harkins met and obviously connived with Newport regarding the same subject matter. Baymiller on the witness stand could state no reason why Ragland should again meet and confer with defendants Hoppe, Howard, Newport and Krause concerning appellees' competition in the market place [R. 992].

In the light of the foregoing the following facts are also significant as a complete repudiation of appellant Flintkote's limited defense, and their obvious attempt to belatedly obscure their illegal conspiratorial acts aimed directly at appellees [R. 993-994].

Harkins, after personally conferring with appellees' competitors and after ordering all of the top ranking officers and agents of Flintkote to repeatedly confer with such competitors, still felt it necessary—for a reason never explained to the jury—to have the acoustical tile promotion man of Flintkote, Ragland, make an additional investigation of appellees and submit a written "report," as to "whether or not appellees were doing business in the Los Angeles area" [R. 922-928, 932-933]. It is noteworthy, however, that this report consists largely of

items having nothing to do with the only question in Harkins' mind [Ex. I, R. 903-904, 906]. Under cross-examination none of the defense witnesses, including Ragland, Baymiller, Thompson, Heller, Lewis, and Harkins (all Flintkote officials), could offer any explanation to the jury why these extraneous and admittedly irrelevant matters were contained in the report [R. 1103-1105]. The uniform reply of these Flintkote witnesses on this point was to the effect that these extraneous items had nothing to do with Flintkote's purported interest in appellees' operation [R. 907, 925-928, 932-933, 944]. Here again, the testimony of the same witnesses is in conflict. Ragland admitted that Harkins asked for the information contained in his report [R. 907-908, 922-927] and admitted further that other than his instructions he saw no other purpose for the extraneous items being in his report. Therefore, the only possible conclusion the jury could draw from the testimony on this defense exhibit was that after appellant had agreed with appellees' competitors to eliminate appellees' competition, Flintkote deliberately set about to manufacture some legal justification for its then contemplated act of complying with its conspiratorial agreement.

In connection with the above Exhibit I and Flintkote's limited defense generally, it is interesting to note the contradictions in Ragland's testimony in his deposition taken prior to trial and his testimony during the trial with respect to this report. In his deposition he denied, contrary to the evidence, that until a few days prior to February 15, 1952 (the date of his report), that he had any idea of the fact that appellees were operating in the Los Angeles area, and that in order to find appellees' Los Angeles address he was compelled to go around "knocking on doors" [R. 908].

After receiving Ragland's report and after all of the meetings with appellees' competitors—and it is to be

noted that in none of them did the contractor defendants state or admit that Flintkote took the position they now rely upon—even then Harkins is stated to have felt it necessary to call in the “privy counsel” of Flintkote officers (Lewis, Thompson, Baymiller, and Ragland) for the alleged purpose of further discussing appellees’ position and the action to be taken by Flintkote with respect to the demands of appellees’ competitors [R. 1070]. In appraising appellant’s defense the jury must have considered the fact that even yet Flintkote had not contacted appellees in any way to find the answer to the single question which appellant says was involved; *i. e.*, whether appellees were doing business in Los Angeles [R. 960-961]. The result of this “privy counsel” meeting was that Harkins—and again without consulting appellees—delegated *three* of the top Flintkote officials to perform the simple task of notifying appellees that Flintkote would no longer supply them with its line of acoustical tile [R. 235-239, 240-241, 249-250, 933]. There can be no doubt that this termination was an unconditional refusal to sell and final in all respects [R. 1071-1072, 1096-1097]. The pertinent facts with respect to this termination meeting are, of course, somewhat in conflict—even as they relate to the testimony of appellant’s own witnesses on direct and cross-examination.

Nevertheless, the following facts are clear: (1) appellees were shocked at being notified their source of supply had been shut off [R. 954]; (2) this was obviously their first intimation of the disaster; and (3) the manner of termination as well as all of the acts of defendants leading up to the event are most inconsistent with the simple “business motive” upon which the defense hangs.

It is, of course, clear under the law that appellees were under no obligation to introduce evidence showing consideration flowing to Flintkote in payment of a knowing and illegal participation in the conspiracy to destroy ap-

pellees' acoustical tile contracting business. In spite of this legal principle, however, there was evidence from which the jury could have found—had it been necessary—such a consideration. This evidence is as follows and is relevant to show not only a consideration, but is indeed strong evidence to repudiate Flintkote's limited defense in the action. At the very time Flintkote was negotiating with appellees for the purpose of giving them the Flintkote line of acoustical tile, they admittedly had one outlet, namely, the defendant Sound Control, who was unsatisfactory in that it was using Flintkote tile only as a supplement to its regular competing line of acoustical tile manufactured and supplied to it by the National Gypsum Company [Ex. J, R. 1007-1009, 1014, 1078]. Contrary to appellant's statement (page 3 of their Opening Brief) to the effect that Sound Control was supplanted in June of 1952 by the defendant Acoustics, Inc. as Flintkote's third dealer in the Los Angeles area, this substitution was actually made at or about the very time Flintkote was terminating the supply of tile to the appellees [R. 1016, 1044*].

Here again the fact that Acoustics, Inc. (a relative inexperienced newcomer in the acoustical tile contracting business [R. 838-839, 851] and a member of the defendant Association) was chosen in preference to a reinstatement of appellees who were experienced and who handled only Flintkote tile is again evidence of the conspiracy to monopolize all approved tile within the membership of the Association and to maintain the status quo of the pre-existing monopoly in that respect. Finally, Exhibit J shows beyond doubt that commencing as soon as possible after Flintkote had agreed to and did accede to appellees' competitors' demands to eliminate appellees' competition,

*Appellant's Ex. J shows that Acoustics in the year 1952 purchased \$63,640.94 worth of Flintkote tile while Sound Control purchased only \$3,590.72.

the three other Flintkote dealers increased substantially their purchases of Flintkote tile [R. 1043-1044, 1075-1076].

When it is considered that there is a lapse of from two or three months to as much as eight or ten months between the acceptance of an acoustical tile bid and the actual purchase and installation of the tile [R. 1082], these figures are especially illuminating and point to the fact that the increased purchases reflected in the exhibit commencing with the year 1952 and 1953 would justify the inference that such increases were the result of an agreement by appellees' competitors to purchase more Flintkote tile as compared to their purchases of competing tile in consideration of Flintkote's agreement to eliminate appellees' competition with members of the Association.

Therefore, to mention only a few of the evidentiary highlights showing Flintkote's knowledge of and participation in the conspiracy we find:

(1) Their admitted knowledge of the non-competitive nature of the industry as it existed in the Los Angeles area [R. 1086-1089];

(2) The objections of appellees' competitors to any new competition in the area, including specifically that of appellees;

(3) The pertinent and admitted conniving as evidenced by the repeated and numerous conferences between Flintkote and appellees' competitors for the obvious purpose of finding ways and means and excuses to destroy appellees' competition;

(4) The concoction by Flintkote of a wholly unnecessary and irrelevant written report in a futile attempt to obscure their knowing cooperation in the destruction of appellees' acoustical tile business, their admitted destruction of same;

(5) The contradiction between the testimony of appellees and the defense witnesses;

(6) The complete lack of any attempt by the defendants during the course of the trial and through the large number of contracting defendants called by Flintkote who were directly involved to inquire into or make any attempt to rebut or discredit the testimony of appellees and exhibits with regard to the bid allocation and price fixing scheme established against the contractor defendants, and finally, the undeniable fact that it was only after (a) appellant had investigated and approved appellees as Flintkote contractors and (b) thereafter at the behest of appellees' competitors, Flintkote admittedly destroyed appellees' acoustical tile business by taking away its sole supply of tile and almost immediately giving it to Acoustics, Inc., a relatively inexperienced competitor of appellees and a member of defendant Association.

Evidence on Damages.

In view of the admitted and *established act* of Flintkote in terminating appellees' only source of supply of competitive tile, the fact of damage cannot be disputed. The record further shows without serious dispute: (1) That appellees spent substantial sums of money and extensive effort in obtaining business facilities and in organizing and otherwise establishing their branch operations in San Bernardino [Exs. 38-39, R. 216-217]; (2) That each of the appellees as experienced salesmen had negotiated contracts for execution by the Downer Company which amounted to approximately one carload of tile per month [Exs. 38-39, R. 668, 681], since each appellee's monthly sales commission with Downer amounted to in excess of \$1200 a month which in turn amounted to 10% of the gross installed price of acoustical tile in the area. As appellant has pointed out an additional 10% on said sales (constituting Downer's net profit) would have come

to appellees in the operation of their own business. (3) That under the established and undisputed pricing formula in effect in the acoustical tile contracting business the net profit on each carload of tile to appellees would have been approximately \$5400 [Exs. 38-39]. Neither of these facts were disputed in the record and indeed appellant deliberately avoided reference to such facts in examining any of the contractor defendants or their representatives which Flintkote called as their own witnesses during the course of the trial. (4) There is no dispute whatever that appellees after the tortious act of appellant herein were compelled to pay 17% more for the non-competitive acoustical tile they were able to purchase than they would have paid for approved competitive acoustical tile in the absence of such tortious acts. (5) That after appellant had terminated appellees' source of supply of competitive approved acoustical tile on or about February 19, 1952, appellees were unable to bid for acoustical tile jobs of any consequence because of their lack of an assured source of supply of A. M. A. approved tile to perform such jobs [R. 270-276], and that (6) The record shows without dispute that the measure of appellees' damage resulting from appellant's tortious acts culminating in the termination of their only available source of competitive tile is as follows: *a.* Loss of out of pocket money as a result of not being able to continue their San Bernardino operation \$1920. [Exs. 38-39.] This item is not disputed. *b.* Out of pocket money resulting from the necessity of appellees having to pay from 17% to 20% more for non-competitive and unapproved tile in uncertain quantities from lumber yards in the amount of \$12,758.57 over a three-year period. [Exs. 38-39.] There is some conflict of opinion evidence on the exactness of this figure. *c.* Loss of profits occasioned by appellees' inability to compete because of their inability to obtain an assured source of supply of accredited tile projected through the first full year of operation in the amount of \$43,200 based upon

the sale of only one carload of tile per month by *both appellees*. The record is clear and without dispute that each appellee had been accustomed to selling approximately this amount of tile per month. *d.* Loss of profits in the amount of \$64,800 projected through the second year of operation based upon the expert testimony of appellees and upon their undisputed testimony regarding their past accustomed sales experience with Downer and their ability to continue such sales volume. *e.* Loss of profits in the sum of \$86,400 for the third year of operation based upon the same evidence and contemplating the normal (undisputed) anticipated growth. Again, neither the experience or past performance of appellees nor their opinion as to anticipated growth of their own venture was seriously disputed or attacked during the course of trial.

Summary of Appellant's Contentions and Argument in Reply to Appellant's Specification of Error.

Point 1 of appellant's specification of alleged error challenges or deals with the sufficiency of the evidence to sustain the jury's verdict and charges error in the Court's refusal to set aside the jury's verdict. Appellees contend the evidence was sufficient to require the submission of the case to the jury and was sufficient to support the jury's verdict in favor of appellees. Points 2, 3, and 4 of appellant's specification of alleged error charge error in the admission of evidence in the form of documents showing price fixing and job allocation among the contractor defendants, in the admission of certain testimony by appellees as to declarations of Ragland relating to conversations between Flintkote officials and the defendants Krause, Howard, and Newport concerning and objecting to the competition of appellees with the contractor defendants in the Los Angeles area. Appellees contend that there was no error committed in connection with the admission of this evidence; that in any event any alleged

error now urged was waived and was not prejudicial to appellant; that this Court must limit its review of such alleged error in the admission of evidence to the limited scope of appellant's final motion to strike at the conclusion of all of the evidence. Points 5 through 10 of appellant's specification of alleged error charged error in the Court's instructions to the jury, and in the Court's failure to give other instructions. Appellees contend that the instructions as actually given by the Court were approved as given and no objections were in fact made by appellant at the time the instructions were given, with the single exception of appellant's request that the Court instruct the jury in accordance with its proposed Instructions 46A through 46F which said instructions involved a contrary and conflicting theory of law, which appellees submit was erroneous and contrary to the evidence in the case, and that the instructions as given by the trial court were proper and legally correct. In point 11 appellant charges alleged error in the trial court's refusal to grant its motion for a new trial upon the ground that the verdict was against the weight of the evidence. It is appellees' contention that the Court's ruling in this respect was correct, and that under the facts and evidence of this case, the trial court's decision is not reviewable here. Points Nos. 12 and 13 charged alleged error in the instructions with respect to the period of time in which damages could be measured. Appellees contend that the jury was correctly instructed on this point, and that appellant's proposed instruction 46A through 46F was contrary to the law and the evidence. Point 14 of appellant's specification of alleged error challenges the reasonableness of the attorney's fees fixed by the Court in the sum of \$25,000. Appellees contend that the amount of attorney's fees so awarded was reasonable, and that appellant in its brief to this Court and in its objections to the attorney's fees in the Court below has admitted substantially the reasonableness of such fee. Point 15 of appellant's speci-

fication of alleged error challenges the trial court's disposition of the \$20,000 paid to appellees by appellant's co-conspirators in consideration of a covenant not to sue. Appellees contend that the decision of the trial court providing for the deduction of this sum from the judgment of \$150,000 was correct.

For convenience of argument and in what we believe to be the interest of orderly presentation, this brief will treat the various points sought to be raised herein by appellant in the following order: Point 1 pertaining to the sufficiency of the evidence to sustain the jury's verdict and the Court's ruling on appellant's motions mentioned therein will be treated in section I of this brief. Points 2, 3, and 4 relating to the admission of evidence will be treated in section II of this brief. Points 5 through 10 charging alleged error for the Court's failure to adequately give certain instructions proposed by appellant at the commencement of the trial, but to which no objection was raised at the time the Court instructed the jury, will be discussed in Section III of this brief. Point 11 relating to the Court's refusal to grant appellant's motion for a new trial, etc. on the grounds that the verdict was not supported by legally sufficient evidence, and that the verdict was against the weight of the evidence will be discussed under Section IV of this brief. That portion of appellant's Point 11 relating to the alleged excessiveness of the damages will be treated in Section V of this brief in connection with the general argument pertaining to damages as will Points 12 and 13 relating to the instructions of the Court with respect to the measurement of damages. Point 14 of appellant's specification of alleged error relating to the reasonableness or unreasonableness of the attorney's fees fixed by the Court will be discussed in Section VI of this brief. Point 15 relating to the trial court's disposition of the \$20,000 paid to appellees in consideration of the covenant not to sue will be discussed in Section VII of this brief.

ARGUMENT.

I.

The Evidence Was Adequate to Sustain the Finding of the Jury That Flintkote Knowingly Participated in an Unlawful Conspiracy. The Trial Court Properly Denied Appellant's Motion to Set Aside the Verdict. (Error No. 1, App. Br. pp. 11, 46.)

Preliminarily the Court's attention is directed to the fact that appellant's argument is dependent upon the following untenable propositions:

1. A request that this Court reweigh and reevaluate isolated portions of the entire evidence to the exclusion of all other evidence before the jury.

2. A complete avoidance of the instructions of the Court and the finding of the jury as applied to that part of the overall conspiracy causing appellees' damage, namely, Flintkote's agreement with appellees' competitors to destroy their business; and

3. A patent attempt to divert this Court's attention from the knowledge of Flintkote of the inevitable effect and unlawful character of Flintkote's act of destruction pursuant to its agreement with appellees' competitors (App. Br. pp. 46-60).

Concisely stated, the question now before this Court is whether there was any evidence in the record supporting the jury's conclusion that Flintkote knowingly agreed with appellees' competitors to destroy or restrain appellees' ability to compete in the industry for the stated purpose of aiding the contractors' monopoly. We believe there is no doubt that there was such evidence in the record. We believe the evidence is sufficient to support a conclusion by the jury that Flintkote in fact had to have knowledge not only of the immediate phase of the conspiracy causing appellees' damage, but of the entire conspiracy and monopoly existing in the industry as a whole.

In the latter connection it would seem clear that the jury need only have found that Flintkote knowingly participated with appellees' competitors for the illegal purpose and effect of destroying or restraining appellees' competition—a conspiracy and restraint which is a *per se* violation of the Sherman Act.

Appellant admits in its brief that there was evidence tending to show a conspiracy among the acoustical contractors to fix prices and allocate jobs (App. Br. p. 47). It must also admit there was evidence showing a monopoly of all accredited and competitive acoustical tile in the hands of said contractors, that there was a total lack of price competition among manufacturers of such acoustical tile, that other types of competition among acoustical tile manufacturers was likewise restrained or eliminated through the so-called "split selling" policies of the manufacturers whereby a single defendant contractor constituted the sole outlet for two otherwise competing lines of acoustical tile, and that the inevitable result and the admitted purpose of terminating appellees' only available source of supply was, in addition to the destruction of appellees' competition, to perpetuate and preserve this non-competitive picture in the industry [R. 190-193, 780-781, 837, 841-847, 981, 1011, 1075-1082, 1086-1089, 1123, 1125-1126, 1128, 1130, 1139, 1141-1143]. Appellant also does not deny the expert and qualified character of appellees and their approval of appellees as an acoustical tile outlet for its product [R. 450-451, 858, 859, 943, 1031, 1062; Ex. 44].

Flintkote does not and cannot deny that its officials held *numerous* meetings with appellees' competitors for the sole purpose of discussing their complaint about appellees entering the acoustical tile business [R. 1143-1146, 1149-1151, 1157-1158]. The record shows likewise without dispute that after agreeing with its co-defendants to eliminate appellees' competition, an unsatisfactory co-

defendant contractor was replaced by another and inexperienced co-defendant contractor as an outlet for Flintkote tile [R. 838-839].

Appellant's own exhibit shows without dispute that after Flintkote agreed to and did in fact destroy appellees' competition, its sales of acoustical tile to Flintkote's co-conspirators increased immeasurably [Ex. J]. There can be no doubt from the record that the evidence including all of the circumstances thoroughly discredited the sole defense of Flintkote that they acted independently in terminating appellees' source of supply and for the sole reason that appellees were alleged to have been violating their agreement with Flintkote to the effect that they would not do business in the Los Angeles area where Flintkote's co-conspirator contractors operated [R. 202-206, 459-460, 651-652, 903, 904, 1162-1164, 1176, 1186; Exs. 2, 3, 4, 5, 6, 44]. Flintkote officials obviously intended and knew from the start that appellees' principal business operations were in fact to be in the Los Angeles area [R. 228-229, 1061, 1115-1116, 1120-1121; Exs. 4 and 44].

The record is utterly devoid of any evidence whatsoever even remotely indicating a *sound business motive* on the part of Flintkote for terminating appellees' source of supply of tile unless in fact it consists of a promise from appellees' competitors to increase their own purchases of such tile at the expense of "competing lines" of tile which they likewise handled [Ex. J]. Such a business motive obviously would avail Flintkote nothing as a defense here.

The foregoing are merely examples of the circumstantial and other evidence in the record which as a whole must, in the minds of the jury, have thoroughly discredited Flintkote's untenable defense.

In its brief appellant admits that there is sufficient evidence in the record "to support a conclusion that Flintkote

cut off the plaintiffs as a result of the activities of Flintkote contractors in complaining to Flintkote" (Br. p. 48). Appellant likewise admits in its brief (Br. p. 52) that the meeting between Flintkote and appellees' competitors admitted to by Ragland was relevant as "one circumstance which in combination with others might show that Flintkote * * * conspired with the contractors." According to appellant's own testimony it would seem equally clear that the repeated meeting reflected therein between all of the top ranking Flintkote officials and appellees' competitors, for the purposes hereinabove stated would, of course, be even more relevant to such a showing of conspiracy. The evidence stands uncontroverted that the sole and only purpose of these latter admitted meetings was to discuss appellees' competitors' demands that Flintkote agree to destroy appellees' ability to compete. Flintkote's entire argument here as well as in other portions of its brief amounts to nothing more than a reiteration of its argument to the jury which was repudiated by the jury's verdict. The general theories of law enunciated in the cases cited in appellant's brief (pp. 47-50) may be admitted for purposes of argument herein. The simple answer is that all of the principles enunciated there find substantial support in the evidence. Flintkote's factual argument in this section of its brief (pp. 46-60) patently ignores the essential knowledge and inevitable effect of its conspiratorial act in agreeing with appellees' competitors to put appellees out of business. Other parts of their argument with respect to the admissibility of Ragland's admissions pertaining to other meetings between Flintkote and certain of appellees' competitors will be treated hereinafter under a separate heading.

The law on the subject is clear:

"It was not incumbent on the government to prove that each defendant participated in that conspiracy

in all of its ramifications, for, in order that one be found guilty as a conspirator, it need only be shown that, with knowledge of the existence of the conspiracy, he knowingly performed an act designed to promote or aid in the attainment of the object of that known conspiracy. *Craig v. U. S.*, 9 Cir., 81 F. 2d 816, 822, certiorari dismissed 298 U. S. 637, 56 S. Ct. 670, 80 L. Ed. 1371, certiorari denied 298 U. S. 690, 56 S. Ct. 959, 80 L. Ed. 1408; *Johnson v. U. S.*, 9 Cir., 62 F. 2d 32, 34-35; *Marcante v. U. S.*, 10 Cir., 49 F. 2d 156, 157.”

United States v. National City Lines, 186 F. 2d 562; cert. den. 71 S. Ct. 735; 341 U. S. 916.

“The criterion to be employed in determining whether concerted action is such as to come within condemnation of Sherman Anti-trust Act is the effect which the action has upon fair competition, and, if concerted action destroys competition, it is unlawful. Sherman Anti-Trust Act, § 1, 15 U. S. C. A.”

United States v. Socony-Vacuum Oil Co., 105 F. 2d 809.

“A conviction resting solely upon circumstantial evidence is not an innovation. It is, we think, well established that the proof and evidence in an anti-trust conspiracy case is, in most cases, circumstantial. Proof of a formal agreement is unnecessary, and were the law otherwise such conspiracies would flourish; profit, rather than punishment, would be the reward. See *American Tobacco Co. v. U. S.*, 6 Cir., 147 F. 2d 93, affirmed 328 U. S. 781, 66 S. Ct. 1125, 90 L. Ed. 1575. As stated in *Interstate Circuit, Inc. v. United States*, 306 U. S. 208, 221, 59 S. Ct. 467, 472, 83 L. Ed. 610, ‘As is usual in cases of alleged unlawful agreements to restrain commerce, the government is without the aid of

direct testimony that the distributors entered into any agreement with each other * * *. In order to establish agreement it is compelled to rely on the inferences drawn from the course of conduct of the alleged conspirators.”

C-O-Two Fire Equipment Co. v. United States,
197 F. 2d 489 (C. C. A. 9th).

In a recent criminal case decided by this Court the same contentions were made as here, namely, that there was insufficient evidence to support the conviction of a union representative who did not compete with the plumbing contractors defendants to fix prices and eliminate competition. There a plumbing contractor in Nevada had obtained a particular plumbing contract for the now defunct Las Vegas race track. Two of the competing contractors attempted to retrieve this contract for members of the conspiracy, by utilizing the services of a union representative named Alsup. This Court found no difficulty in connecting Alsup to the plumbing contractor conspiracy. In its opinion this Court stated:

“In Sylvester’s presence they asked Alsup to protect them. Alsup readily furnished plumbers to Sylvester on another project for the Atomic Energy Commission at the same time he refused to furnish plumbers to work at the race track. The jury could rightfully infer, and so did that, Alsup’s actions were in favor of the pleas of the plumbing contractors that they be protected.”

Las Vegas Merchant Plumbers Ass’n v. United States, 210 F. 2d 732.

It would seem difficult to distinguish the position of Alsup in this case from that of Flintkote even under the latter’s own position on this appeal, since there, as here, Alsup controlled the sole means of eliminating Sylvester’s competition by depriving Sylvester of the means of com-

peting; namely, necessary union labor. Here Flintkote was prevailed upon pursuant to admitted pleas from appellants co-conspirators to withdraw appellees' sole source of supply of material which alone could prevent appellees' competition with the co-conspirator acoustical tile contractors in the area.

**One Joining Subsequent to Original Conspiracy
Is Liable for Preceding Acts of Co-conspirators.**

A co-conspirator who knowingly joins, aids, or abets a pre-existing conspiracy becomes liable for the acts and liabilities of his co-conspirators done or made prior to his entrance into the conspiracy. This has been the uniform rule in the Ninth Circuit and elsewhere. Thus, in *Roberts v. United States*, 248 Fed. 873 (C. C. A. 9th), cert. den. 247 U. S. 55, it was held that the statements of the original conspirators could be received against a co-conspirator who joined in the common purpose after the declarations were made. The common purpose here was admittedly to put appellees out of business and thus maintain the monopoly of their competitors. In that case the defendant was indicted for entering into a conspiracy, to extort money from an alleged violator of the White Slave Act by impersonating an officer of the United States. The Court stated (p. 80):

"We do not find that the admission of evidence relating to matters that occurred prior to Roberts' connection with the case was in any way prejudicial to the defendant Roberts. This evidence was purely introductory, and was only significant in the light of the testimony relating to the proceedings in which the defendant Roberts afterwards participated. *Besides, the evidence was admissible under the familiar rule that, where a person enters into a conspiracy after its formation, the acts and declarations of the other conspirators before he entered are admissible against him.*"

That the rule has always been thus is shown by the case of *Lincoln v. Clafin*, 7 Wall. 132, involving a conspiracy to defraud where the Court stated (p. 138):

“* * * but the Court held that it was sufficient to show that he subsequently, with knowledge of the fraud, became a party to it; that subsequent participation in the fraud and its fruits was as effective to charge him, as preconcert and combination for its execution. In thus holding we perceive no error * * *. If, knowing the fraud contrived, he aided in its execution, and shared its proceeds, he was chargeable with all of its consequences, and could be treated and pursued as an original party. Every act of each in furtherance of the common design was in contemplation of law the act of both. * * *”

It is settled beyond controversy that an agreement in order to be a violation of the act need not be expressed, but may be and usually is “implied from a course of dealing or other circumstances.” (*United States v. Schrader's Son, Inc.*, 252 U. S. 85, 89.)

In the instant case the basic question so far as Flintkote is concerned is the purpose of Flintkote in terminating appellees' only source of supply of acoustical tile. Therefore, the validity or invalidity of such a defense itself must be decided upon the basis of the inferences drawn by the jury from all of the circumstances surrounding the act of termination. These circumstances must, of necessity, include the persuasion exerted upon Flintkote by the other co-conspirators, who were competitors of appellees, and who are shown to have lodged their objections to appellees entering the business of acoustical tile contracting work to the appellant, Flintkote. These objecting co-conspirators sought to prevail upon Flintkote to perform the act of terminating appellees' source of supply for a purpose. The sole purpose has been shown in the evi-

dence and found by the jury under explicit instructions to be the elimination of appellees' competition and the effect of this competition upon a fixed, non-competitive scheme of price fixing and bid allocation among the co-conspirators participating therein. Likewise, there can be little doubt from the evidence that Flintkote had to know the monopolistic position of its co-conspirators with respect to their control of available sources of A. M. A. approved competitive acoustical tile. There is other evidence pertaining to this basic purpose and effect. This evidence stems from the prolonged negotiations between Flintkote and the appellees which lead up to appellees being given the Flintkote line of acoustical tile. The fact that such pressure had been brought to bear was admitted at the final conference between appellees and the Flintkote officials at which appellees were notified that Flintkote would *no longer sell them acoustical tile* [R. 1096-1097]. Appellant through its own witnesses affirmatively introduced evidence of numerous meetings between Flintkote officials and appellees' competitors for the sole purpose of discussing these competitors desire to have Flintkote aid them in destroying appellees competition.

Behind this backdrop of evidence the real purpose and intent has been shown by the activities of the co-conspirators by way of price fixing and bid allocation among themselves on a non-competitive, fraudulent basis. The inference is inescapable from this latter evidence that any outside competitor would disrupt this carefully laid and effective non-competitive plan. From all of the evidence the inference to be drawn was, as charged in the complaint, that the sole reason for Flintkote's act of terminating appellees' source of supply was the protection of the existing monopolistic situation among the acoustical tile contractors named as co-conspirators herein, and was the result of an agreement (coerced or otherwise) between

Flintkote and said co-conspirators to eliminate appellees' competition in the industry.

It is so well established as to hardly need citations that participation in a conspiracy may be proved by circumstantial evidence. The mere commission of an overt act has been held to be sufficient to submit to the jury the question of whether the defendant was a party to the unlawful design, providing the overt act was of a type which had for its purpose or necessary effect the assisting in the accomplishment of the illegal design and purpose.

Likewise, participation in a conspiracy at its inception and knowledge of specific details of the conspiracy have never been held to be essential in order to hold a conspirator joining the conspiracy subsequent to its formation. The cases go so far as to hold that the late joining conspirator need not have known or have met his fellow co-conspirators. He need only knowingly participate in, aid or abet a single, illegal aspect of the overall general purpose and design of the conspiracy. In the instant case the inevitable effect of Flintkote's act in terminating appellees' source of supply was to eliminate their competition with the co-conspirators named herein. The illegality of this act, if performed as a result of an agreement or understanding with one or more of said co-conspirators, would be clear. The circumstantial and direct evidence mentioned hereinabove, it is submitted, is sufficient to justify the jury's verdict without more.

Regarding the fact that knowledge of specific details is not essential to make one joining the conspiracy late liable, see *Cal-Cutt v. Gerig*, 171 Fed. 220, involving a suit to recover damages on the ground that the defendants had entered into an illegal conspiracy to force plaintiff's minstrel show out of town by using threats and violence. There the Circuit Court of Appeals held that:

"All those who participated in the unlawful violence inflicted upon the plaintiff are equally liable

as co-conspirators, regardless of whether they were original parties thereto or not.”

Cal-Cutt v. Gerig, 171 Fed. 220.

Knowing participation in the form of an affirmative act in furtherance of any illegal aspect of the conspiracy is sufficient to hold a co-conspirator. (*United States v. Spadafara*, 181 F. 2d 955 (cert. den. 71 S. Ct. 233.)) In a Ninth Circuit Court of Appeals decision, *Nye & Nissen v. United States*, 168 F. 2d 846, affirmed 69 Sup. Ct. 766, the above doctrine was followed, and the Ninth Circuit Court of Appeals further held that once the existence of a conspiracy is established, *only slight evidence* may be sufficient to connect an individual with the conspiracy, citing *Meyers v. United States*, 94 F. 2d 433, and *Phelps v. United States*, 160 F. 2d 858.

See also, *Alaska Steamship Co. v. International Longshoremen's Association*, 236 Fed. 964; *Fowler v. United States*, 273 Fed. 15 (C. C. A. 9th).

In the instant case we think it clear that the jury could have found that Flintkote was promised and received consideration for its conspiratorial acts in furtherance of the conspiracy in the form of added purchases of tile by its co-conspirators to compensate for Flintkote's loss of sales to appellees. However, benefit or detriment to a co-conspirator is not essential. In *Patterson v. United States*, 222 Fed. 599, 620, the Court stated:

“We have seen that conspiracies in restraint of trade in commerce are not confined to conspiracies by competitors, or on behalf of a competitor against a competitor. It is not even necessary that the execution of the conspiracy be of any benefit to the conspirators. *It is sufficient that it will restrain interstate trade or commerce of the person conspired against.*” (Emphasis added.)

The above principle was aptly described in the case of *Cape Code Food Products v. Nat'l Cranberry Ass'n* (D. C. Mass., 1954), 119 Fed. Supp. 900-910, wherein a banker was convicted of assisting certain cranberry merchants and processors in eliminating a competitor's competition. To the same effect see *Darnell v. Markwood*, 220 F. 2d 374.

In conformity with the above principles the cases are numerous which hold that knowing participation in an illegal object of the conspiracy by an individual co-conspirator is sufficient to hold him liable as a co-conspirator. See for example *Marino v. United States* (C. A. A. 9th), 91 F. 2d 691, 699, where the Court stated:

"The court also instructed the jury that if appellant Gullo 'gave the use of his premises for the landing or the storage of the alcohol, he assisted in the enterprise,' and that it seemed to the court that it would not be a violent inference to infer that appellant Gullo had knowledge of the conspiracy. We believe the inference is correct. It is highly improbable that Gullo could permit such use of his premises, without knowing that the men who stored the alcohol had agreed to defraud the United States. Of course the court instructed the jury that his comment on the evidence was 'in no sense controlling upon' the jury.

"A very similar instruction was given regarding defendant Spooner. We likewise believe it to be correct. Finally, each of the appellants contends that there is no substantial evidence to support the verdicts. We have set forth the portion which, if believed, is pertinent. Each contends that there is no proof of knowledge.

"The evidence related shows that appellant Spooner assisted in the actual unloading of the alcohol. Under

the circumstances, it was a proper inference to infer that Spooner knew that there was an agreement to smuggle the alcohol into this country and thus defraud the United States.

“With respect to appellant Machado, the proof showed that he helped unload the alcohol and stored it on his property. Under the circumstances, knowledge on his part could be properly inferred.

“The jury could have properly inferred that appellant Marino was a principal conspirator by agreeing to the use of the boat for which he received freight tribute.

“As to Gullo, the evidence is meager, though we believe sufficient. It is true that: ‘The failure of a person to prevent the carrying out of a conspiracy, even though he has the power so to do, will not make him guilty of the offense without further proof that he has in some affirmative way consented to be a party thereto.’ *Weniger v. United States* (C. C. A. 9), 47 F. (2d) 692, 693. But here, Gullo permitted his premises to be used for storage and the re-canning of alcohol. Such permission aided the purpose of the conspiracy, and as we have said, the jury could properly infer knowledge.

“We find no error affecting the substantial rights of appellants.

“Affirmed.”

One knowingly taking part in carrying conspiracy into effect is a party thereto, though he joined at a later stage or took minor part or may not have known all conspirators.

Mendelson v. United States, 60 F. 2d 532.

The law requires no more than affirmative action on the part of a conspirator to carry an illegal purpose into effect to hold him as such.

Marino v. United States, supra;

United States v. Empire Hat and Coat Mfg. Co.,
47 F. 2d 395;

Curley v. United States, 160 F. 2d 229.

“It was enough that, knowing that concerted action was contemplated and invited, the distributors gave their adherence to the scheme and participated in it.
* * * It is elementary that an unlawful conspiracy may be and often is formed without simultaneous action or agreement on the part of the conspirators.’
Interstate Circuit v. United States, 306 U. S. 208, 225, 227, 59 S. Ct. 467, 474, 83 L. Ed. 610.”

Goldman Theatres v. Loew's, et al., 150 F. 2d 738.

See also to the same effect:

Paramount Film Distributing Corp. v. Village Theatre, 228 F. 2d 721;

American Tobacco Co. v. United States, 328 U. S. 781;

Rocona v. Guy F. Atkinson Co., 173 F. 2d 661
(C. C. A. 9th).

**Compulsion or Coercion of Co-conspirator Upon Flintkote
Is No Defense to Flintkote's Illegal Act in Terminating
Appellees' Source of Supply.**

In *United States v. Paramount Pictures, et al., 66 Fed. Supp. 323, 352*, the minor distributor defendants (including Universal and Columbia) sought special consideration on the ground that they had been compelled by the large exhibitor defendants in that case to accede to

the condemned plan of distribution. In answer to that contention the Court stated:

“The defendants argue that these privileges granted to the circuits flow from their negotiations with the individual theatre-owners rather than from a standard policy of discrimination deliberately pursued by them. This is perhaps true, but the result is the same whether the bargaining power of the large exhibitors forces upon the distributors a discriminatory policy, or whether the latter voluntarily carry such a policy into effect. Acquiescence in an unreasonable restraint, violates the Sherman Act.”

The Supreme Court in the same case expressly stated with regard to this contention of the minor defendants:

“There is some suggestion on this as well as on other phases of the case that large exhibitors with whom defendants dealt fathered the illegal practices and forced them onto the defendants. But as the District Court observed, that circumstance if true does not help the defendants. For acquiescence in an illegal scheme is as much a violation of the Sherman Act as the creation and promotion of one.”

United States v. Paramount Pictures, 334 U. S. 131, 161, 68 S. Ct. 915, 931.

The conclusive answer here, of course, is that the jury found as a fact that Flntkote did knowingly aid, abet, and join a conspiracy to prevent appellees from competing with Flntkote's co-conspirators in the sale and installation of acoustical tile.

II.

There Was No Error Committed by the Trial Court in the Admission of Evidence. The Alleged Errors Urged Here Were Waived by Appellant and Were Not Prejudicial. (Specification of Error Nos. 2, 3, 4.)

Under this portion of its brief commencing at page 61 appellant first contends that prejudicial error was committed in connection with the admission of evidence relating to the price fixing and bid allocation scheme practiced by its co-conspirators. Appellant objected to the admission of this testimony on the ground that Flintkote had not been connected with the conspiracy. The Court admitted this evidence subject to a motion to strike in the event appellees failed to connect Flintkote to the conspiracy [R. 293]. At the end of the appellees' case Flintkote moved to strike the same testimony on the same ground, namely, that there was no evidence in the record connecting Flintkote to an illegal conspiracy [R. 714]. This motion was made simultaneously and in connection with Flintkote's motion to dismiss or in the alternative for a directed verdict [R. 714]. Both motions were overruled by the trial court and Flintkote thereafter proceeded to introduce defense evidence.

At the close of all of the evidence appellant renewed its motion for a directed verdict as well as its motion to strike certain parts of the evidence. This latter motion to strike, however, was limited solely to the testimony of Lysfjord with respect to Ragland's admissions. The testimony sought to be stricken occurs along with other matters on pages 474 to 480 of the record [R. 1214-1215].

The general principles of law applicable here are as follows:

First, Rule 43, Rules of Civil Procedure, 28 U. S. C. A. 728, *et seq.*, provides that the rules of evidence are to be

construed in favor of the reception of evidence in accordance with the most convenient method prescribed in any of the statutes, rules, or principles applying to the admissibility of evidence. Similarly, where the judgment is for a plaintiff and the whole evidence, with all inferences the jury could have drawn from it, was insufficient to support a verdict for defendants, the judgment should not be reversed although there may have been errors in ruling on the evidence or in charges given or rejected.

Rule 61, Federal Rules of Civil Procedure, relating to harmless error provides:

“No error in either the admission or the exclusion of evidence and no error or defect in any ruling or order or in anything done or omitted by the court or by any of the parties is ground for granting a new trial or for setting aside a verdict or for vacating, modifying or otherwise disturbing a judgment or order, unless refusal to take such action appears to the court inconsistent with substantial justice. The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties.”

The granting or denying of appellant's motions at the end of the plaintiff's case in the Court below was discretionary with the trial judge and the Court's discretion should be regulated not merely by an alleged lack of evidence at that time, but by the probabilities of whether such evidence will arise before the whole evidence is in at the end of the case. (*Bates v. Miller* (1943), 133 F. 2d 645; cert. den. 63 S. Ct. 1446.) It is the accepted and better practice to defer such rulings until the close of the case.

Guess v. Baltimore & O. R. Co., 191 F. 2d 967;

Wright v. Paramount, etc., 97 Fed. Supp. 833.

It is equally clear that having proceeded with its defense evidence after its motion to strike and to dismiss were overruled at the end of plaintiff's case, Flintkote waived such motions except insofar as the subject matter of the same were covered or referred to in its motion to strike and for a directed verdict at the end of all of the evidence. Flintkote's motion at this latter stage of the proceedings is as follows [R. 1214-1215]:

"Mr. Black: At this time, if the Court please, we wish to renew our motion for a directed verdict in favor of the defendant * * * on the ground there is no evidence to connect the defendant to a knowing participation in a conspiracy that is competent.

"And in that connection, we renew our motion to strike the testimony of the plaintiff Lysfjord as to Mr. Ragland's alleged admissions contained in pages 381 and 387 of the transcript."

Appellee Waldron's testimony regarding these same admissions of Ragland were not covered by appellant's motion to strike. Waldron's testimony appears at pages 261, 262, 263, 269, and 270 of the Record. Nor did said motion cover the numerous documents [Exs. 18-37] relating to price fixing and bid allocation among Flintkote's co-conspirators or the identifying and explanatory oral testimony of the appellees regarding this evidence. Each of appellant's own witnesses were examined on the latter matters as will be shown hereinafter. Appellant's objection to the admission of evidence must, by this Court, be limited, therefore, to the evidence sought to have been stricken by its motion made at the conclusion of the case, namely, to the fragmentary bit of appellee Lysfjord's testimony at pages 474 to 480 of the printed record. Likewise, the question of whether or not appellant was prejudiced must be decided at this point in the light of all

of the evidence in the record, and the trial court's ruling hereon would not seem to be reviewable by this Court in the absence of a clear showing of an abuse of discretion *to the prejudice of appellant*. Since the motion to set aside the judgment here was based upon the weight of the evidence and alleged errors in the admission of evidence (which in any event were not prejudicial and which were waived) there would seem to be no basis for this Court's disturbing the judgment below.

A. The Evidence Regarding: (1) Bid Allocation and Price Fixing Among the Contractor Defendants, and (2) Ragland's Admission of the Overt Acts of Krause, Newport, and Howard Was Admissible.

In the case of *International Indemnity Co. v. Lehman*, 28 F. 2d 1 (cert. den. 49 S. Ct. 83), the Court held:

"The rule we deduce from these cases is that an admission of one conspirator, if made during the life of the conspiracy, is admissible against a joint conspirator, when it relevantly relates to and is 'in furtherance of the conspiracy.' Construing the expression 'in furtherance of the conspiracy' reference is not to the *admission* as such, but rather to the act concerning which the admission is made; that is to say, *if the act or declaration, concerning which the admission or declaration is made, be in furtherance of the conspiracy, then it may be said that the admission is in furtherance of the conspiracy.*" (Italics supplied.)

See also *Vitagraph, Inc. v. Perelman*, 95 F. 2d 142 (C. C. A. 2, 1936), involving a Sherman Act suit.

In *Pan-American Petroleum Co. v. United States*, 9 F. 2d 161 (C. C. A. 9, 1926), affirmed 273 U. S. 456, the Court expressly recognized that an agent may bind the

corporation by his admissions and declarations although they relate to past events and transactions. In so holding the Court stated (p. 169) that:

“There can be no question but that the declarations of an officer or agent of a corporation, even though they consist of a narrative of past facts, may, under appropriate circumstances, be admitted in evidence against the corporation, nor does the admissibility of such declarations necessarily depend upon the length of time that has elapsed between the occurrences and the declarations, 10 R. C. L. 978.”

In the case of *Clune v. United States*, 159 U. S. 590, the Court expressly recognized that it was familiar law that where a case rests partially or even wholly upon circumstantial evidence, much discretion is left to the trial court, and its ruling will be sustained, if the testimony which is admitted tends even remotely to establish the ultimate fact. Here one ultimate fact was Flintkote's purpose.

In *Reeder v. United States*, 262 Fed. 36, and in the cases cited therein for the proposition, the Court stated with respect to evidence similar to that objected to here, that:

“An examination of this record discloses that all of this testimony had relation to the common purposes of violating the statute * * * and that these organizations were working with defendants in carrying out the intents and purposes of the alleged conspiracy. The act of such organizations in furtherance of the common purpose is evidence against all co-conspirators; and this is so though the conspirator committing the act was not a defendant in the case being tried. *Clune v. United States*, 159 U. S. 590, *Eisenhower v. United States*, 256 F. 842.”

Finally, in the case of *Delaney v. United States*, 263 U. S. 856 (per Mr. Justice McKenna), the Supreme Court stated:

“The only exception, however, was to the testimony given by one of the conspirators of what another one of the conspirators (the latter being dead) had told him during the progress of the conspiracy. We think the testimony was competent and within the ruling of the cases (citing cases). And it has been said that the extent to which evidence of that kind is admissible is much in the discretion of the trial judge.
* * * We do not think the discretion was abused in this case.”

We submit that the evidence clearly shows that Ragland and other Flintkote officials were in fact unnamed co-conspirators in the case—the defendants, Krause, Newport, and Howard were named conspirators.

Even where evidence of a crime, other than that with which defendant is charged, tends to throw light on a particular fact or to explain conduct, the trial court has a discretion as to admitting that evidence, which a reviewing Court will not ordinarily interfere with. (*United States v. Sebo*, 101 F. 2d 889.)

In a conspiracy case wide latitude is allowed in presenting evidence, and it is within the discretion of the trial court to admit evidence which even remotely tends to establish or explain the conspiracy charged.

Phelps v. United States, 8 Cir., 160 F. 2d 858;

Egan v. United States, 8 Cir., 137 F. 2d 369
(cert. den. 320 U. S. 788, 64 S. Ct. 195, 88 L. Ed. 474).

In *Vilson v. United States*, 61 F. 2d 901—a Ninth Circuit opinion—this Court held that:

“The common object of the associated persons forms a part of the *res gestae* and evidence was admissible even though conspiracy was not charged * * * all of which was for the jury’s consideration in determining the guilt or innocence * * * as an aider or abetter. He was guilty as a principal.”

Again, in *Flanagan v. Provident Life & Accident Ins. Co.*, 22 F. 2d 136, the Circuit Court there observed:

“There can be no well defined rule as to what is properly admissible as a part of the *res gestae* in all cases, and in passing on the question in each individual case the trial judge is acting in the exercise of his discretion, and in the absence of an abuse of that discretion there is no error.” (Citing cases.)

On this appeal it is obvious that appellant cites no facts which could be construed so as to show an abuse of discretion. Appellant’s sole argument in this respect is premised upon idle surmise on what “might” have influenced the jury. It need only be pointed out that appellant’s own affirmative evidence standing alone “might” have been the deciding factor in the mind of the jury.

The Second Circuit in *Eagle Lion Film v. Loew’s, Inc.*, 219 F. 2d 196, held that:

“* * * under the Federal Rules of Civil Procedure, the relevance of evidence is nowhere keyed to the particular persons before the court. And so far as some detailed items of proof may depend upon a preliminary showing of conspiracy, the fact that co-conspirators have not been named as parties does not at all prevent or aid the showing of their complicity.”

A case particularly in point is *Lee v. Mitcham*, 98 F. 2d 298, holding that

“Evidence of Edmonston’s intention was pertinent to the issue—indeed it was the issue,—and the court was compelled to receive any competent evidence which would prove what that intention was.”

Also, Flintkote’s intention was the crux of the only defense offered and appellant recognized the competency of the evidence which they say here should have been stricken by the trial court (App. Br. p. 52).

For the scope of admissibility of evidence pertaining to motive, intent, and purpose, see the following cases.

American Tobacco Co., et al. v. United States, 147 F. 2d 93 (affirmed 328 U. S. 781, 66 S. Ct. 1125);

Standard Accident Ins. Co. v. Heatfield (C. C. A. 9th), 141 F. 2d 648;

National Labor Relations Board v. Pacific Greyhound Lines (C. C. A. 9th), 91 F. 2d 458;

Mayola v. United States, 71 F. 2d 65 (C. C. A. 9th);

Compare:

Craig, et al. v. United States, 81 F. 2d 816 (C. C. A. 9th), cert. den. 56 S. Ct. 670;

Standard Oil Co. v. United States, 221 U. S. 1, 75-76.

In *Gordon v. United States*, 164 F. 2d 855; cert. den. 68 S. Ct. 741, 330 U. S. 862, the Court held:

“Much of the testimony objected to was so closely a part of the history of the conspiracy and of the substantive act as to be part of an interwoven chain of relevant circumstances. It lay within the dis-

cretion of the trial court as to whether it should be admitted, and this discretion was not abused. *United States v. Sebo*, 7 Cir., 101 F. 2d 889. The fact that some of the testimony indicated the complicity of the accused in other crimes did not make it inadmissible, since it tended to throw light upon facts and conduct in issue. *Means v. United States*, 62 App. D. C. 118, 65 F. 2d 206."

Finally this Court's attention is directed to Appendix A, consisting of a certified copy of the record in *Socony-Vacuum Oil Co. v. United States*, *supra*.

The relevancy of Ragland's admissions seems sufficiently clear as to make extended argument unnecessary here. They were admissions of the first overt acts of the conspiracy which ultimately resulted in the destruction of appellees' business—overt acts of named co-conspirator defendants which were obviously in furtherance of the conspiracy. Even appellant admits their relevancy (App. Br. p. 52). Contrary to appellant's statement there, Ragland's admissions pertaining to the objections of appellees' competitors and these competitors expressed desire at that time to have Flintkote aid them in terminating appellees' business were relevant as bearing directly upon not only the intent and purposes of the conspiracy, but they likewise were pertinent as indicating (in the light of other evidence) Flintkote's purpose in participating in that part of the conspiracy directly resulting in appellees' damage.

The same thing is true of the evidence pertaining to the price fixing and bid allocation scheme of the contractor defendants. Appellant at the close of all of the evidence apparently conceded the relevancy of this latter

evidence since it failed to cover such evidence in its motion to strike. Furthermore, appellant's attempt to pass Ragland off as a minor employee of Flintkote should avail them nothing in the face of the record in this case. Ragland was admittedly the chief promotional tile man for the Flintkote Company in this area. He was directly in charge of promotion and sales. We think furthermore the record shows clearly that Ragland was one of the principal actors with respect to Flintkote's participation in the conspiracy. From the time of the initial objections of appellees' competitors to and including the actual termination of appellees' supply of acoustical tile, he was clearly shown to be an agent of Flintkote as well as an unnamed co-conspirator along with Harkins, Lewis, Thompson, Baymiller, and Heller of the Flintkote Co. We believe all of this evidence was admissible under the law as evidence of the conspiracy, the purpose and intent of the conspiracy, the knowledge and purposes of Flintkote regarding the immediate object of the conspiracy aimed directly at the destruction of appellees' business, and that such evidence was obviously a part of the *res gestae* as being explanatory of the conspiracy and its purposes.

All of the above evidence, together with direct evidence produced by appellant regarding the numerous meetings between its officials and appellees' competitors and Flintkote's admitted knowledge of the monopoly of all accredited acoustical tile in the hands of the defendant contractors [R. 1086-1089] was likewise pertinent to show the extent of Flintkote's knowledge and participation as an aider and abetter of that part of the overall conspiracy relating to the price fixing and bid allocation activities of the defendant contractors.

B. The Alleged Errors Urged by Appellant (Nos. 2, 3, and 4) Were Not Prejudicial and Were in Fact Waived by Appellant During the Course of the Trial.

The early Supreme Court case of *Hansen v. Boyd*, 161 U. S. 397, 16 S. Ct. 571, stated:

“The sixth assignment relates to the overruling of a motion, made at the close of the evidence for plaintiffs, that the court instruct a verdict for the defendant; and assignments 7 to 15, inclusive, attack portions of the charge to the jury. As to the alleged error in refusing to instruct a verdict at the close of the evidence for plaintiffs, it is sufficient to say that it has been repeatedly held by this court that when, after such a motion, the defendant introduces testimony, as was done in the case at bar, an exception to the action of the court in refusing to direct a verdict is waived. *Runkle v. Burnham*, 153 U. S. 216, 14 S. Ct. 837.”

This Circuit in *Boulter v. Commercial Standard Ins. Co.*, 175 F. 2d 763 (rehearing den. Aug. 17, 1949), stated:

“It urges that when the appellants rested, after concluding their testimony in the court below, they had not made a *prima facie* case, and that the court should have sustained the appellee’s motion to dismiss, made at that stage of the proceedings. We deem it unnecessary to discuss this question since the appellee proceeded to introduce the evidence upon which the appellants now rely, and thereby waived any error that may have been made in the court’s ruling. *Moore v. Tremelling*, 9 Cir., 100 F. 2d 39, 43; *Bates v. Miller*, 2 Cir., 133 F. 2d 645.”

In *Novick v. Gouldsberry*, 173 F. 2d 496 (C. C. A. 9, 1949) this Court stated in connection with a case arising under an Alaska statute:

"This section accords with what was the federal rule generally, prior to the adoption of Rule 50, Federal Rules of Civil Procedure. And this Court has held that if such motion is made by a defendant and is overruled, it is waived by the subsequent introduction of evidence by him. *Fulkerson v. Chisna Mining & Imp. Co.*, 9th Cir., 1903, 122 Fed. 782, 784; *Walton v. Wild Goose Mining & Trading Co.*, 9th Cir., 1903, 123 Fed. 209, 214; *Northwestern Steamship Co. v. Griggs*, 9th Cir., 1906, 146 Fed. 472; and see, *Hansen v. Boyd*, 1896, 161 U. S. 397, 16 S. Ct. 571, 40 L. Ed. 746; *Union Pacific Ry. Co. v. Daniels*, 1894, 152 U. S. 684, 14 S. Ct. 756, 38 L. Ed. 597; *Runkle v. Burnham*, 1894, 153 U. S. 216, 222, 14 S. Ct. 837, 38 L. Ed. 694."

"* * * Nor is it now important to determine whether there was evidence sufficient to charge these defendants when they moved to dismiss at the close of plaintiff's case, for the case now should be determined upon a survey of the whole evidence, which, as Wigmore says, 'naturally renders any prior error immaterial.' 9 Wigmore on Evidence, 3d Ed., 1940, §2496, citing cases; *Columbia & P. S. R. Co. v. Hawthorne*, 144 U. S. 202, 12 S. Ct. 591, 36 L. Ed. 405; *Brown v. Carver*, 2d Cir., 45 F. 2d 673."

Bates v. Miller, 133 F. 2d 645 (2d Cir., 1943, cert. den., 63 S. Ct. 1446).

To the same effect see:

Boston Ins. Co. v. Fisher, at al., 185 F. 2d 977 (8th Cir., 1950; rehearing den. Jan. 25, 1952); *Home Ins. Co. of New York v. Dahila* (1954), 212 F. 2d 731;

Auto Transport v. Potter, 197 F. 2d 907;

Meier & Pohlmann Furniture Co. v. Troeger (1952), 195 F. 2d 193;

Capital Transport Co. v. Compton (1951), 187 F. 2d 844.

The waiver by appellant of its original objections to evidence and its original motion to strike the same at the end of plaintiffs' case is based upon the same principle as the foregoing cases respecting motions to dismiss or similar motions. Objection to competency of evidence is lost if the objecting party himself offers testimony on the same subject matter as evidence. Under these circumstances it cannot be said that any alleged error concerning the original evidence is prejudicial.

In *United States v. Gruber*, 123 F. 2d 307 (C. C. A. 2d) the court held:

“Particular objection is made to the cross-examination by the government of some of the appellant's character witnesses. One of them, Charles S. Colden, the County Judge of Queens County, New York, testified that Gruber had an excellent reputation for truth and veracity. Judge Colden had given answers which indicated that he had in a general way followed the work of the appellant while a Deputy Assistant Attorney General of the State. He was, however, asked on cross-examination whether Paul McCauley, an Assistant Attorney General of the State, had reported to the Chief of the Securities Division that he had information that Gruber had received a bribe as a Deputy Assistant Attorney General. While Colden denied that he had heard the rumor, there would, under some circumstances, be prejudice in suggesting reports of the commission of crimes not within the scope of the indictment. But, whether or not the question was permissible, it cannot be regarded as damaging,

in view of the fact that Gruber took the stand himself and was examined fully about the alleged bribery and explained that the charge against him was withdrawn by a litigant who had made the complaint and that the matter was closed to the satisfaction of the Attorney General of the State. Objections are made to similar questions to the character witnesses Pette, Fitzgerald and Brunner, who answered that they had not heard of the report that the appellant had been charged with receiving a bribe. There is no claim that the government's counsel did not ask the questions in good faith and the error, if any, was cured by appellant's own testimony."

In *Trouser Corporation of America v. Goodman & Theise, Inc.*, 153 F. 2d 284 (C. C. A., 3d), the Court held:

"But we think the defendant waived this objection. In cross-examination of the plaintiff's witness A. A. Fogley, the defendant asked for the statement made by Housley to the witness. When Housley was called by defendant he was asked in direct examination if he had made the statement attributed to him. Objection to competency is lost if the objecting party himself offers the same testimony as evidence."⁶

⁶Jones Commentaries on Evidence, 2d Ed., 4994, §2524, Waiver of Objections:

"Where the objection is not to the form or nature of the particular evidence, but to the substance or subject matter, the objecting party may also waive objection by himself introducing evidence of the facts objected to, or by suffering the particular subject to be opened up without objection."

The numerous state cases and less frequent federal decisions cited in support of the rule do not express it with the same succinctness as the commentators have. Whether par-

ticular circumstances fit the rule or its exception is often difficult to determine from the record. In the instant case, not only was Housley asked whether he had made the statement to the admission of which the same counsel had previously objected, but Fogley was also questioned concerning the statement Housley had made. That fact, we feel, is of sufficient weight to bring the Housley statement in on the ground of waiver of objection by use of subsequent evidence of the same nature.

This Court in *Franklin v. United States* (1912), 193 Fed. 334, ruled that where the trial court permitted handwriting testimony (subsequently admissible in Pennsylvania) over objection, the conduct of the objectors with respect to the same type of evidence cured the defect of admission.

In *Bevard v. Bevard*, 103 Fed. Supp. 533, the Court stated:

"The defendant, Mrs. Grace Bevard, was called as a witness for the plaintiff. Mrs. Bevard, who is now eighty-six years of age, testified that she was not generally familiar with the administration of the Katherine Bevard estate, but that her husband had told her that the estate had been settled. The latter testimony was unquestionably objectionable as hearsay, but such objection was cured when the same fact was subsequently brought out by the plaintiff's own cross-examination of Mr. Shoemaker."²

²*United States v. Gruber*, 2d Cir., 123 F. 2d 307; *Trouser Corporation of America v. Goodman & Theise, Inc.*, 153 F. 2d 284 (C. C. A. 3).

To the same effect see:

National Distilleries Corp. v. Comphanhia, etc.,
107 Fed. Supp. 69.

Compare *Anglo California National Bank v. Lazard*, 106 F. 2d 693 (C. C. A. 9), holding that objections to the competency of evidence received on condition of other proof are waived unless later renewed by a motion to strike.

Preliminarily, it would seem to be clear that in the absence of the testimony and evidence sought to be stricken

by any or all of appellant's motions the remainder of the evidence justifies the verdict of the jury to the effect that appellant conspired with competitors of appellees to eliminate appellees' competition in the industry. Indeed the evidence coming from the mouths of appellant's own officials and contractor witnesses pertaining to Flintkote's knowledge of the contractor defendants' monopoly of all approved acoustical tile and the numerous meetings between Flintkote officials and appellees' competitors would seem to be sufficient under the law to compel an affirmation of the jury verdict and judgment.

The only evidence sought to be stricken by appellant's final motion to strike [R. 1214-1215] is the testimony of appellee Lysfjord relating to a conversation with Ragland in which Ragland stated that Krause had called at the offices of Flintkote to object to appellees' competition; that Howard had similarly objected either by telephone or by personal call, and that Newport of the defendant Coast Company had objected either in person or by phone [R. 474-480]. It has hereinbefore been shown that appellee Waldron gave the same testimony of Ragland's admissions which was not covered by appellant's motion to strike. It is likewise clear that appellant's own witnesses described in detail *numerous* similar meetings and contacts between Flintkote officials and appellees' competitors for the purpose of discussing the demands of appellees competitors that Flintkote aid them in terminating appellees' competition. These numerous meetings and their surrounding circumstances which were testified to affirmatively by appellant's own witnesses were much more decisive of the issue than were the so-called Ragland admissions [R. 1012, 1018-1029, 1046-1050, 1065-1068, 1090-1093, 1100]. As we have stated, there is no difference in either the purpose, objects, or the subject matter of these numerous meetings testified to by Flintkote witnesses from the subject matter of the so-called Ragland admissions. The only conceivable distinc-

tion or conflict could in no wise have had any significance to the jury nor have effected any prejudice to appellant. The difference would seem to consist solely of the fact that the meetings and conversations were held at the places of business of the objecting contractors and at the Brown Derby Restaurant rather than at the offices of the Flintkote Company. The record likewise shows that at the outset of the case the chief counsel for appellant, in his partial opening statement to the jury, admitted the very substance of the so-called Ragland admissions. He there told the jury that Flintkote would not dispute the fact that it had received objections to appellees' business activities from appellees' competitors [R. 184-185].

Similarly, with respect to the evidence relating to price fixing and bid allocation among the defendant contractors (to which appellant's final motion to strike made no reference) each of the witnesses called on behalf of Flintkote was interrogated on direct examination concerning their price fixing and bid allocation activities. As an example only, see Record 1012, 1018-1029, 1065-1068. Similar interrogation along the same line was used in connection with the other contractor defendants called by Flintkote and with most, if not all, of the Flintkote officials called by appellant.

The record will show that the testimony of appellant's own witnesses regarding their conversations and meetings with Flintkote officials concerning appellees' competition, when compared to the evidence of the admissions of Ragland to appellees, were by far stronger and more convincing proof of conspiracy purpose and intent [R. 949-951, 990, 1010-1011, 1017, 1018, 1046-1048, 1050, 1064-1065, 1067, 1090-1091, 1099, 1124-1125, 1126, 1128, 1141-1144]. Therefore, it is submitted that there could have been no prejudice to appellant under the law as enunciated in the foregoing cases from any such evidence.

III.

There Is No Merit to Appellant's Assignment of Error Relating to the Giving or Failure to Give Instructions to the Jury. (a) The Appellant (With a Single Exception) Did Not Object to the Instructions as Given by the Court and in Fact Approved the Court's Charge. Appellant, Therefore, Is Precluded From Urging Error on Appeal. (b) The Court's Instructions as Given Were Adequate and Legally Correct. (Points 5-10.)

It is axiomatic under the Federal Rules of Civil Procedure, the local rules of the District Court of Southern California, Central Division, and under the adjudicated cases that failure to object at the time of the giving of instructions and prior to the retirement of the jury precludes a party from urging error on appeal based on said instructions.*

Federal Rules of Civil Procedure

“Rule 51. Instructions to Jury: Objection.

“At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. The court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury, but the court shall instruct the jury after the arguments are completed. No party may assign as error the giving or the failure to give an instruction unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection. Opportunity shall be given to make the objection out of the hearing of the jury.”

*Compare Rule 20 2(d) of the Rules of this Court.

The local District Court Rules of the District of Southern California, Central Division, reiterates the purpose of the basic Federal rule:

“Rule 14. INSTRUCTIONS TO JURY.

“(a) * * *

“(b) Instructions and Formal Objections There-
to:

“The jury shall be instructed by the court as provided in rule 51 of the F. R. C. P. Objections to a charge, or to a refusal to give as a part of such charge instructions requested in writing, shall be made by any party, by stating to the court before the jury have retired, that such party objects to the same, specifying by numbers of paragraphs the parts of the charge objected to, and the *requested instructions, the refusal to give which is objected to, and specifying the grounds of objection.*

“As to any charge given by the court on its own motion, the grounds of objection shall be specific. The clerk shall note any objection in the minutes of the trial if a reporter is not present. * * *”
(Emphasis added.)

“This rule (Rule 51) requiring that party assigning error to an instruction given or not given must have objected thereto before jury retired, has as its purpose to require parties to enable trial court to clarify or correct his statement before the jury retires.”

New York N. H. R. Co. v. Zermani (1953), 200 F. 2d 240, cert. den. 73 S. Ct. 729; 345 U. S. 917; 97 L. ed. 1351.

or as stated in *Stillwell v. Hertz Drive-urself Stations*, 174 F. 2d 714:

“This rule was designed to preclude counsel from assigning as error on appeal matter at trial which he did not fairly and timely call to the attention of the trial court.”

This Court is, of course, also committed to the uniform doctrine adverted to in Rule 51:

“These instructions, not having been excepted to by either party, became the law of the case, and in determining whether the evidence was sufficient to sustain a verdict for plaintiff, we must test its sufficiency by the law as announced therein. *National Surety Corp. v. City of Excelsior Springs*, 8 Cir., 123 F. 2d 573, 577, 156 A. L. R. 422; *cf. F. W. Woolworth Co. v. Carriker*, 8 Cir., 107 F. 2d 689, 692.”

State Farm Mutual Auto Insurance Co. v. Porter (9th C. C. A.), 186 F. 2d 834.

To the same effect see:

Las Vegas Merchant Plumbers Ass'n v. U. S. (C. C. A. 9th), 210 F. 2d 732;

Thorp v. Am. Aviation & General Ins. Co. (1954), 212 F. 2d 821;

Allen v. Nelson Dodd Produce Co. (1953), 207 F. 2d 296;

Harlem Taxi Ass'n v. Nemish, 191 F. 2d 459;

Smith v. Welsh, 189 F. 2d 832;

Boston Ins. v. Fisher, 185 F. 2d 977;

Green v. Reading Co., 183 F. 2d 716;

Hansen v. St. Joseph Fuel etc. Co., 181 F. 2d 880, cert. den. 71 S. Ct. 89, 340 U. S. 865, 95 L. ed. 633.

The trial court in the instant proceedings by stipulation and agreement of counsel gave his instructions “orally and in logical sequence and in common speech so that laymen to be guided thereby will have an intelligent understanding of their true meaning.” (*Downie v. Powers*, 193 F. 2d 760.)

It is clear from the proceedings after all of the evidence and prior to jury arguments that the procedure followed by the Court with respect to instructions was acquiesced in by counsel for both parties, and this acquiescence by counsel amounted in fact to an approval of the instruction procedure actually followed by the Court consisting of leaving it to the Court’s discretion which of the more than 100 proposed instructions were to be given and the manner and sequence of the giving of such instructions. The Court’s remarks on this occasion make the instruction procedure actually adopted clear and are as follows [R. 1220-1221]:

“The Court: The settlement of instructions is always a difficult problem. It all too often bogs down into the niceties of language, and we find that instructions that are finally given are given more with an idea to appellate decision language than to helping the jury here.

“There are over a hundred proposed instructions and some of them quite long. I suppose it would take a full court session if they were all given. I am wondering if, since there isn’t a great deal of conflict—each side has in some instances asked for the very same instruction—if the court cannot simply read the charging language of the amended complaint, the relevant portions of the statute involved, give the classical definition of conspiracy and the necessity of finding that this defendant was a member of the particular conspiracy, and then get into dam-

ages doing it as best I can as a condensation from these long instructions you have given, and then call upon you to state your exceptions and if I have left anything out I will try to give it.

“That is what we have done generally in other cases, but this is the first antitrust case I have had to go to the jury.

“Mr. Black: I think we can work out some such formula [1312].

“Mr. Ackerson: I don’t see any objection to that, your Honor.”

The assignments of error of appellant numbered 5 to 10, inclusive, with the exception noted, refer to alleged errors on the part of the Court in instructing the jury to which no exception or objection was taken or made by appellant at the time the charge was given. It now for the first time seeks to raise alleged defects in the Court’s charge contrary to the rule by merely calling this Court’s attention to certain of its proposed instructions submitted to the Court prior to the time of trial. In each instance appellant admits that “no specific objection was made to the failure to give those instructions at the time when the Court instructed the jury” (App. Br. pp. 20-31, incl.). An examination of the Court’s instructions as a whole makes it abundantly clear that each of the alleged errors now raised by appellant were adequately covered in the Court’s charge. It is to be further noted that in no case does appellant allege the Court’s failure to instruct, but only failure “adequately” to instruct. Thus, point 5 charges the Court failed “adequately to instruct the jury that it could return a verdict for plaintiffs only if it found that defendant Flintkote was a party to an unlawful conspiracy * * *” and failed “adequately to instruct the jury that defendant Flintkote was the only defendant

in the case.” Appellant then proceeds to extract certain isolated and disconnected parts of the Court’s instruction to illustrate its point (App. Br. pp. 21-22). The Court instructed the jury not once, but a number of times on both of these points, and read as a whole the instruction was clear and most favorable to appellant [R. 1233-1261]. After cautioning the jury that it must consider the instructions as a whole and could not single out any single instruction in arriving at its verdict, the Court pointed out in clear and concise language that Flintkote or any manufacturer had a legal right to select its own customers [R. 1235]; that in order for the jury to find a verdict against Flintkote it must find that it joined an illegal conspiracy under the antitrust laws [R. 1236]; that Flintkote was the only defendant before the Court though the Complaint was filed against many defendants, and that they were not to be concerned with what had happened in the case with respect to the other defendants—“we are trying the case here today as to this one defendant” [R. 1239]; that in order to hold Flintkote the jury must find an intentional participation by Flintkote in a transaction made with a view to further the common design—must find that Flintkote knowingly and purposely engaged in activities to forward the illegal scheme; that the jury must find that Flintkote joined and participated in the conspiracy with knowledge of its purpose and object and with intent to promote the same; that Flintkote as a matter of law would be privileged, acting independently and as a matter between itself and a proposed customer to refuse to deal with any customer [R. 1240-1241]; “that if the Flintkote Company acted in concert with anyone or more of the other defendants here, and the acting in concert was in violation of the law which I will read to you, then the conspiracy would be made out” [R. 1241-1242]; that

“a primary question for you to consider is whether defendant Flintkote Company was a party to an un-

lawful contract, combination, or conspiracy in restraint of interstate commerce or to monopolize a part of such commerce. If you find that no such unlawful combination or conspiracy existed or that the Flintkote Company was not a party to any such combination or conspiracy, even if one did exist among others, you must return a verdict for the defendant and you need not consider any other questions”

(This latter instruction was a direct quotation from one of defendant’s proposed instructions.) Continuing the Court instructed

“‘In other words, one of the primary questions here is, was there a conspiracy and if there was, was the defendant on trial today a member of that conspiracy or was it acting independently of whatever the conspirators might have been doing.’”

The Court continued:

“If you find that the defendant, the Flintkote Company, knowingly agreed with one or more of the acoustical tile contractors named the defendants in this case, to restrict or prevent plaintiffs from competing with such acoustical tile contractors, you are instructed that this would be a violation of law and if you find that this violation resulted in damage to the plaintiffs’ business or property, your verdict should be for the plaintiffs in the amount you find they have been damaged.

“The Flintkote Company can be liable for refusing to sell acoustical tile to plaintiffs only if such refusal to sell was in furtherance of and as a consequence of a knowing participation in an unlawful combination and conspiracy.”

The latter quoted instruction was likewise taken verbatim from appellant's own proposed instruction. Finally, continuing the Court stated:

“In other words, we come back to the old principle that if the Flintkote Company was acting entirely on its own, without conspiracy with the other defendants, then there is no cause of action” [R. 1246-1247]. The Court further instructed the jury that a conspiracy cannot exist between a corporation and its own employees or agents, acting in such capacity, and that “accordingly, you may not base a finding of conspiracy merely upon any concert of action solely among the agents and employees of the Flintkote Company, and that “you cannot find that the Flintkote Company was engaged in an unlawful transaction, combination or conspiracy solely upon the basis that the fact that the Flintkote Company refused to sell or stopped selling acoustical tile products to plaintiffs” [R. 1248].

On this point the Court further instructed the jury that in addition to finding a conspiracy to unreasonably restrain or monopolize interstate commerce to the public injury [R. 1249, 1251] that “you must find in addition to that, before you can find for plaintiffs, that the defendant on trial here, the Flintkote Company, was an actual participant in the conspiracy and was not acting independently of the conspiracy and in its own interest acting alone” [R. 1252].

Even the foregoing extended excerpts from the Court's entire charge cannot give the complete fairness of the Court's charge when read as a whole. It is offered merely to illustrate the fragmentary and superficial nature of appellant's belated objections before this Court. See Record 1253-1261 for the Court's entire charge. The obvious approval of appellant to the instructions, as given, and the fact that no objections (to any of the matters now sought to be raised in this part of appellant's brief) were made to the Court will be shown hereinafter in this section

of appellees' brief by reference to the entire record as it pertains to the Court's invitation to both counsel to make objections and the failure of appellant's counsel to do so at the time. It is, of course, clear that the so-called objections contained on page 23 of appellant's brief are both inadequate and were, in fact, never intended to constitute an objection to the Court's instructions even at the time the statements were made by Mr. Black. For example, the first quotation by Mr. Black was made in an informal discussion with the Court in the nature of a pre-trial proceeding in chambers and constituted merely an observation by Mr. Black directed not at the Court's charge, but at certain typewritten proposed instructions which had therefore been submitted to the Court by appellees. There can be no contention here that any of the instructions (proposed) to which the remark may have been directed were used by the Court in charging the jury at the end of the case. For a better understanding of this informal conference, see Record 150-161. Similarly the second remark made by Mr. Black and quoted on page 23 of appellant's brief as constituting an objection was likewise made in an informal proceeding in the Court's chambers relating to a number of problems and was and purports to be nothing more than Mr. Black's observations that he *would make objections* to certain of appellees' proposed instructions in the event the Court adopted them in their then present form. It is also apparent that appellees' counsel made similar statements with respect to appellant's proposed instructions during the course of this informal meeting. Mr. Black's final observation quoted on page 23 merely refers to an inadvertent chance remark of the Court in general instruction on conspiracy law which obviously resulted in no confusion and was corrected many times as hereinabove pointed out in the course of the Court's instructions as a whole. In any event, it is obvious Mr. Black in no wise considered this

an objection to the Court's charge and made no request thereby that the Court correct any specific part of his charge.

Appellant's Point 6 (App. Br. pp. 23-27) was admittedly not the subject of an objection at the time the instructions were given and erroneously and belatedly alleges that the Court failed to instruct the jury nevertheless that only unreasonable restraints of trade are prohibited by the law. Again appellant quotes fragmentary and disconnected parts of the Court's instruction as a whole in an apparent attempt to obscure the patent fairness of the Court's charge in this respect. The Court's instructions on the point of unreasonableness are contained in the record, pages 1243, 1244, 1245, 1249, and elsewhere throughout the instructions as a whole. There, the Court instructed the jury as to the purposes of the law that a restraint of competition in commerce must be direct and intentional, that commerce is restrained if competition is hindered, obstructed, injured, or prevented; that an essential characteristic of monopoly is a wrongful exclusion of competitors from the field; that the elimination of competition in interstate commerce was unreasonable if the parties acted in concert and by conspiracy; that the law condemns the power and exercise of such power on the part of an organized group to eliminate competition; that the jury must find the existence of a conspiracy and combination to eliminate competition; that the jury must find that Flintkote knowingly agreed with one or more of the acoustical tile contractors to restrict or prevent plaintiffs from competing with such acoustical tile contractors, and that plaintiffs' business was damaged thereby; that the jury must find in order to hold for plaintiffs that there had been some appreciable harm to the public interest by finding that the restraint imposed brought about or was reasonably calculated to bring about an increase in prices to the consuming public, a diminution

in the volume of merchandise in the competitive markets, a deterioration in the quality of the merchandise available to the channels of commerce or some substantial consequence to the free flow of that commodity in commerce, etc. The latter instruction was taken verbatim from one of appellant's proposed written instructions.

"Before you can conclude that a combination, agreement or concert constitutes an unlawful conspiracy or concert you must determine that its inherent tendency is to substantially lessen, hinder or suppress competition into the channels of trade or commerce or to monopolize trade or commerce with respect to the commodity here involved" [R. 1249].

It is clear from this part of the Court's instructions and from the instructions as a whole that the Court charged correctly and fairly that if the jury found that Flintkote combined and conspired with one or more of the contractor defendants to eliminate appellees' competition in the purchase, sale, and installation of acoustical tile by taking away appellees' only source of such tile purchased and received from Hawaii that that would constitute an unreasonable restraint of trade and commerce and would amount to a *per se* violation of the antitrust laws. The law is clear on this point:

Darnell v. Markwood, 220 F. 2d 374;

International Salt Co. v. United States, 332 U. S. 392, 68 S. Ct. 12;

Paramount Film Distributing Corp. v. Village Theatre, 228 F. 2d 721;

United States v. National City Times, 186 F. 2d 562; cert. den. 341 U. S. 916, 71 S. Ct. 735;

United States v. Socony-Vacuum Oil Co., 105 F. 2d 809.

This instruction was substantially made and is implicit and clear in the entire instruction of the Court. Indeed, as will be shown herein appellant's counsel made no objection to these instructions or to other points which it now seeks to raise and in fact approved such instructions as given.

Appellant's Point 7 argues for the first time before this Court that the instructions regarding the necessity of a finding of injury to the public as a prerequisite to a verdict for appellees was confusing or inadequate but admits that the jury was correctly given such an instruction at page 1249 of the record. Again, appellant admits that "defendant did not object to this error at the time when the instructions were given."

What has been said with respect to appellant's Points 5 and 6 is obviously applicable to this alleged point of error. Moreover, it is to be observed that the instruction directed expressly to this proposition contained on page 1249 of the record was taken from one of appellant's proposed instructions and would seem to be much more favorable to the appellant than the law permits or requires. We think it clear that the giving of this instruction proposed by appellant was neither justified nor necessary under the circumstances of this case since injury to the public is shown by proof of the intentional elimination of the benefits of free and open competition in the market place without more and without the further finding imposed upon the jury here to the effect that it must find that prices have been raised, quality deteriorated or amount of flow of interstate commerce restrained or diminished.

"And while abuses of price fixing and the like, not here directly involved, have been the traditional criteria of illegality under the Act, there are other indicia of illegal conduct, 'of which exclusion of competitors from the market is one, International Salt Co. v. United States, 332 U. S. 392, 396, 68 S. Ct. 12, 92 L. ed. 20, which are condemned per se by

Section 2 regardless of whether or not the position of dominance has been exploited to rig prices', *Gamco, Inc. v. Providence Fruit & Produce Bldg.*, 1 Cir., 194 F. 2d 484, 486, 487. Moreover, it is not material under Section 3 that defendants are not themselves competitors of plaintiff if the combination of which they are a part nevertheless restrains competition between those who are competitors. *Mandeville Island Farms v. American Crystal Sugar Co.*, 334 U. S. 219, 236, 68 S. Ct. 996, 92 L. ed. 1328.

“* * * * *

“Appellees cite District of *Columbia Citizen Pub. Co. v. Merchants & Mfr's Ass'n*, D. C. D. C., 83 F. Supp. 994, and *Arthur v. Kraft-Phenix Cheese Corporation*, D. C. Md., 26 F. Supp. 824, as barring the action on the ground that the principal purpose of the antitrust laws is to protect the public. But the test is whether ‘the restraint is shown to have or is intended to have an effect upon prices in the market or otherwise to deprive purchasers or consumers of the advantages which they derive from free competition.’ *Apex Hosiery Co. v. Leader*, 310 U. S. 469, 500, 501, 60 S. Ct. 982, 996, 84 L. ed. 1311, and cases there cited. The Court quotes *Appalachian Coals v. United States*, 288 U. S. 344, 360, 53 S. Ct. 471, 77 L. ed. 825, as follows:

“* * * only such contracts and combinations are within the act as, by reason of intent or the inherent nature of the contemplated acts, prejudice the public interests by unduly restricting competition or unduly obstructing the course of trade.’

“See, also, *William Goldman Theatres v. Loew's, Inc.*, 3 Cir., 150 F. 2d 738, 743, *Id.*, 3 Cir., 164 F. 2d 1021, certiorari denied 334 U. S. 811, 68 S. Ct. 1016, 92 L. Ed. 1742. The restriction unduly prejudices the public interest when it is intended, as here

alleged, to eliminate the competition of plaintiff by taking the steps enumerated to exclude him from all suitable and desirable office space, though, as we have said, substantial control and exclusion from such space would suffice.” (*Italics added.*)

Darnell v. Markwood, 220 F. 2d 374.

In any event it is clear that no objection was made to the charge as given and it is further clear from the instructions that in no event is it shown that appellant was prejudiced or that the instruction as given was not favorable to appellant. Finally, appellant admits (App. Br. p. 28) that “in fact, the Court in its instructions to the jury gave the substance of defendant’s Instructions Nos. 30 and 32 [R. 1249],” and must admit that its proposed instruction No. 31 was likewise given in substance in a number of places in the Court’s instructions to the jury. (See appellees’ argument to Points 5 and 6, *supra*.)

Appellant’s alleged points of error Nos. 8 and 9 are admittedly subject to the same infirmities herein pointed out in connection with Points 5, 6, and 7. In Point 8 appellant quotes three of its proposed instructions which were submitted to the Court in advance of trial and contends that the Court erred in failing to give such instructions even in the admitted absence of any valid objections by appellant. It is, of course, obvious from what we have said with respect to Point 6 that the substance of each of these instructions was in fact given, and here again, it is admitted that no objection to the Court’s instructions were made with respect to the issue now sought to be raised before this Court.

Appellant’s Point 9 seeks to raise before this Court for the first time an objection to the Court’s instruction on the burden of proof by citing its proposed instruction on the subject and by referring to a brief colloquy between one of appellant’s counsel and the Court in lieu

of the specific objection required by the rules. First it is to be noted that the Court's instruction as given was proper and adequate, and stated substantially the contents of appellant's proposed instruction No. 14 new. It would seem that this belated and unfounded objection is based solely upon appellant's preference for the use of their particular verbiage in this proposed instruction.

The Court in its instructions defined burden of proof at various times in its entire instruction to the jury. On pages 1234-1235 of the record the Court expressly instructed that "It is incumbent upon one who asserts the affirmative of an issue, thus having the burden of proof, to prove his allegation by a preponderance of the evidence" and the Court went on to define the term "preponderance of the evidence" here and elsewhere in the instructions. Again, on page 1241 of the record the Court stated

"The evidence in proof of the conspiracy may be circumstantial. Where circumstantial evidence is relied upon to establish the conspiracy or any essential fact, it is not only necessary that all the circumstances concur to show the existence of the conspiracy or fact sought to be proved, but such circumstantial evidence must be inconsistent with a rational conclusion otherwise."

Again on pages 1254 and 1255 the Court instructed the jury with respect to burden of proof as follows:

"Now, in this matter you will recall that the court has said, 'He who asserts the affirmative of a matter must produce a preponderance of evidence.'

* * * * *

"The person who asserts the affirmative on the case has to have a preponderance of evidence, which means there must be a little more evidence, at least a little more evidence on his side than on the other side, be-

cause if you find that it is evenly balanced, then the decision goes to the one who resists the case, not the one who is trying to establish the affirmative.”

Appellant’s Point 10 complains that the Court failed to instruct the jury in the language contained in its proposed instruction 42 relating to the necessity of appellees proving pecuniary loss or damage, and that this fact must be proved by a preponderance of the evidence. The proposed instruction also refers indirectly to an alleged necessity of a showing of public injury to which we have previously reverted in our prior argument, and to the contrary that there is no duty imposed by law upon a defendant to show that its acts have not worked injury to plaintiff. Here again, the relevant substance of appellant’s proposed instruction was given by the Court in its own language. See pages 1254-1255 of the record quoted in the appellees’ immediately preceding argument with respect to Point 9. See also the Court’s instructions contained on the preceding page 1254 relating to the necessity of finding that any damages were the proximate result of the conspiracy.

On this point and after being invited to do so out of the presence of the jury appellant’s counsel requested the Court for an additional instruction [proposed Instruction No. 45 new, R. 1257] which was given as requested [R. 1259]. After the giving of which and after an additional request from the Court for any criticism of its charge by counsel, Mr. Black, chief counsel for appellant, expressed his satisfaction on this latter point and offered no further objections to the instructions as given.*

*We are excepting appellant’s objection to the court’s refusal to give Proposed Instruction 46A through F. The legal theory embodied in this proposed instruction will be treated in our discussion of damages.

In connection with appellees' argument with respect to alleged points of error numbered 5, 6, 7, 8, 9, and 10, the following portion of the record is conclusive of the extent of appellant's objections made at the time the instructions were given and of the extent to which appellant acquiesced and approved the instructions as given [R. 1256-1261].

"Now, counsel, the court will hear your exceptions to the charge.

"This is a duty that the law imposes upon the attorneys and upon the court. After the judge has instructed the jury, which, as you have observed, is a moderately lengthy process, and always subject to the possibility that the judge has overlooked something or has had a slip of the tongue, the attorneys may step around to the side of the bench, out of the hearing of the jury, and point out to me what they think (1488) my errors have been, and may suggest ways in which the instructions should be extended.

You may do that now.

(Whereupon, the following proceedings were had in the presence but out of the hearing of the jury.)

Mr. Doty: For the record, I think we should have our 14 new on burden of proof, which said that the plaintiff has the burden of proof on all issues, and that in the event he does not sustain the burden of proof, they are to find for the defendant. I don't think that was ever stated.

The Court: There were many instructions submitted on that particular issue. I selected one and did not wish to repeat.

Mr. Doty: We believe that our instructions 46-A through 46-F should be given. It is on an entirely different theory of damages from the one stated, but

for the record, we would like to insist that they be given.

The Court: The insistence is noted and I have given them as far as I feel that I properly can.

Mr. Doty: I take it that it is sufficient if we specify 46-A through 46-F, without specifying which is new, because, obviously, we only want the latest version of those.

The Court: The court will protect you by saying that I understand the exception and I deliberately and knowingly decline to give all the instructions just mentioned. [1489.]

Mr. Doty: We also had an instruction 45 new, which was an additional instruction in connection with damages based on speculation and guesswork, which we feel should be given.

The Court: I had your instruction before me, but I thought a little extemporaneous one would tell them a little better. Do you think I missed it?

Mr. Doty: I don't think you got in the speculation and guesswork aspect of the thing.

Mr. Black: I think that is sound, your Honor. You don't have to be precise, but you just can't pull a figure out of the air.

The Court: I will read it. Hand me that.

Mr. Black: One other observation. I think it is more a matter of confusion than error. In one of the old instructions there were several defendants in the case, which was given, that stated the jury can bring in a verdict against any defendant they find guilty, which is inappropriate in this action. It might tend to confuse. I think that was inadvertently given that way.

The Court: I think I was reading Judge James' instruction at the time.

Mr. Ackerson: That was one of the suggestions I had, was, your Honor, I think we talked this over in chambers before, and I think you ought to give an instruction or a little clarification about the fact, in connection with the suggestion [1490] of Mr. Black's, that the fact of settlement, which has been mentioned to the jury, for income taxes or anything else, should not be taken into consideration any wise by them. They are still to return the same verdict they would otherwise.

Mr. Black: I think that has been adequately covered.

Mr. Doty: I think that has been adequately covered.

The Court: I don't recall that settlement has been mentioned.

Mr. Ackerson: Yes.

Mr. Black: It was by you at the outset, at the beginning of the trial. We agreed you would instruct it had been made. I don't think we need to repeat that.

Mr. Ackerson: They should take no consideration of that. I think that ought to be said now. It has been mentioned to them, but they should eliminate it from their minds and proceed as if it hadn't.

Mr. Doty: There is no sense in calling it back to their minds to eliminate. We told them at the outset to eliminate it from their minds.

Mr. Ackerson: I don't care.

Mr. Black: We might as well let it alone.

Mr. Ackerson: That is all I have. I have no other suggestion. I think you gave a very brief charge, but I can't think of anything you missed. [1491.]

Mr. Doty: I noted our 42 we thought should be given.

The Court: I understand that was in the series.

(Whereupon, the following proceedings were had in the presence and hearing of the jury.)

The Court: I overlooked one I had agreed with the attorneys to give.

The damages, if any, which you may award plaintiffs are not to be based on speculation or guesswork. Damages which you may award plaintiffs are to be just and reasonable and must be based only on such relevant factual data, if any, as was placed in evidence in this case.

The giving of this instruction is not to be taken by you as an indication that the court believes you should give any nor is my cautionary remark to be taken as an indication that I believe you shouldn't.

I am not expressing myself. I don't know who should win this case, and, hence, anything which might indicate to you a state of mind on my part, as to who should win, would be an erroneous interpretation by you, because I haven't figured it out. That is for you to do, and I have had enough problems here to figure out the things that are within my province.

Mr. Ackerson: Your Honor, I don't believe that last instruction is confusing, but the thought just occurred to me, with all due respect, that you may not speculate without telling [1492] the jury what latitude and leeway they may have, which does not constitute speculation. I don't want the jury to have the inference they have to be able to sit down and figure the amount of damage, if they so find, down to the penny or the dollar. They can use their best judgment, based on the evidence that is in the record.

The Court: In the nature of things, if a plaintiff wins in a case of this kind it is impossible, as I told you before, for you to have the data in a case of this kind from which you could take an adding machine and add up the damages with minute exactness.

But you must find some basis in the evidence for any damage which you award, and don't just, as one of the attorneys said here at the bench, draw a figure out of a hat.

Does that satisfy you, Mr. Ackerson?

Mr. Ackerson: Yes, your honor.

The Court: All right, Mr. Black, you can come up here if you—

Mr. Black: I am satisfied on that point.

The Court: Either of you may come up here and state privately any further amplification you think should be given.

All right. The clerk will swear the bailiff."

**Authorities Cited by Appellant in Support of Its Points 5
Through 10 Do Not Apply Under the Facts.**

Appellant's legal argument contained on pages 76 to 92 of its opening brief titled "B. The Court Erred in Its Instructions to the Jury" is necessarily premised on the untenable position assumed by appellant in its factual dissertation on the same subject (App. Br. pp. 20-21), and is, therefore, inapplicable to a situation where, as here, the court's charge correctly stated the law, was predominantly favorable to the appellant, stated in substance the very matters now objected to by appellant on this appeal, contained no demonstratable conflict in the charge as a whole, and where appellant admits that no proper objection was made to that part of the charge covered by these assignments of error. Certainly, appellant's mere

suggestion now that the Court's reference to "defendants" *might have* confused the jury does not state a conflict in the instructions given. Thus, the case of *Voss v. Becko*, 192 F. 2d 827, 830, and *Paramount Film Distributing Corp. v. Applebaum*, 217 F. 2d 101, cited by appellant in support of the proposition that conflicting instructions may be erroneous, have no application to a situation where in fact there was no conflict and where, as here, the instructions when read as a whole were clear and not objected to at the time they were given. In the *Voss* case (the conflicting instructions were obviously the subject of proper objections at the time they were given and were in fact directly contrary to each other. In one instruction the Court submitted to the jury the question of whether the defendant coerced the merchants to breach their contracts with plaintiff while at the same time instructing the jury that there was no evidence to justify a finding that the merchants were forced by defendant to breach their contracts. The reversal and remand in the *Paramount* case, *supra*, was based upon many factors, including outside influence on the jury, local prejudice against the defendants in the case, and prejudicial instructions given over proper objections. None of these elements are present here. There are only appellant's unsubstantiated, argumentative, and distorted assertions which cannot and do not detract from the fairness and non-prejudicial nature of the instructions which were in fact given and approved at the time.

We have no quarrel with the principle enunciated in the cases cited by appellant beginning with *Standard Oil Co. v. United States*, 221 U. S. 1, 31 S. Ct. 5, on page 82 of its brief and ending with *Paramount Film Distributing Corp. v. Village Theatre*, 228 F. 2d 721, on p. 84. The admitted restraint in the case now on appeal was, by the verdict and under the instructions, found to be the destruction of appellees' right to purchase and sell

accredited acoustical tile on a competitive basis for the purpose of eliminating appellees' competition with Flintkote's co-conspirators in the case. The unreasonable nature of such a restraint cannot be questioned and the appellees, under the facts, would have been entitled to an instruction that if the jury found that purpose and effect to exist, it would amount to a *per se* violation of the act. See the cases cited *supra*. Again, appellant made no objection to these instructions at the time they were given.

Appellant's further argument (pages 84 to 92 of its brief) is in the same vein. It is a mere attempt to apply general legal principles to the conclusions of appellant's counsel which find no support in the instructions as given and approved or in the evidence. In the latter case it is also clear that appellant is merely seeking to have this Court reweigh the evidence without even directing this Court's attention to such evidence. Again, the cases cited by appellant in this part of its brief are based upon a situation where "a proper request for an instruction was made" (App. Br. p. 88).

Finally, nowhere in this part of appellant's argument is it shown factually, nor could it be seriously contended, that appellant was prejudiced or could have been prejudiced.

There was no failure on the part of the Court to instruct as to the appellant's theory of the case. Its sole theory as reiterated in the brief and in the record was that it acted independently and for sound business reasons in terminating appellees' source of acoustical tile. The Court covered this theory on numerous occasions in the instructions by instructing the jury (1) that the defendant Flintkote could be liable only if the jury found that Flintkote acted in conspiracy with appellees' competitors, and that otherwise Flintkote had a legal right to refuse to sell appellees for any reason deemed adequate to Flintkote. This instruction was repeated throughout the Court's in-

structions as a whole and properly stated appellant's theory to appellant's obvious satisfaction and approval. In fact, these instructions were taken from appellant's proposed instruction.

IV.

The Court Did Not Abuse Its Discretion in Failing to Grant a New Trial on the Grounds (a) the Verdict Was Against the Weight of the Evidence or (b) That the Damages Fixed by the Jury Were Excessive.

(Specification of Error No. 11, App. Br.
pp. 92-100, 115-133.)

Appellant's Specification of Error No. 11 claims error resulted when the trial court denied its Motion for a New Trial on the above grounds.

It is appellees' contention that the disposition of a Motion for a New Trial based as here upon the weight of the evidence is a matter entirely within the discretion of the trial court, and that its ruling granting or denying the same is not reviewable by an appellate court.

"It has been frequently decided that the allowance or refusal of a new trial rests in the sound discretion of the trial Court, and its action in that respect cannot be made the basis of review by writ of error from this Court. (Cases cited.)" (*Holmgren v. United States*, 217 U. S. 509, 521, affirming 156 Fed. 439 (C. C. A. 9).)

Also, see *United States v. Socony-Vacuum Oil Company*, 310 U. S. 150, 247; *Mattox v. United States*, 146 U. S. 140; *Luke v. United States*, 84 F. 2d 711 (C. C. A. 5, 1936); *Mutual Life Insurance Co. v. Wells Fargo Bank, etc.*, 86 F. 2d 585, 588 (C. C. A. 9, 1936).

In *United States v. Shingle*, 91 F. 2d 85 (C. C. A. 9, 1937), this Court said (p. 90):

“Assignment 36 is that the trial Court erred in denying appellants’ motion for a new trial. This ruling was not assignable as error. *Fairmont Glass Works v. Cub Fork Coal Co.*, 287 U. S. 474, 481
* * *”

However, notwithstanding the procedural infirmity of appellant’s Specification of Error No. 11, appellees contend alternately that appellant has failed utterly to show where in the record the evidence sustaining the trial court’s action was inadequate or that the trial court’s decision on the motion was otherwise assailable.

In order to avoid a duplication of argument and discussion here, this Court’s attention is directed to appellees’ argument in sections I, II and V of this Reply Brief. It is clear that this portion of appellant’s brief insofar as the purported facts are concerned, is based entirely upon the appellant’s bald attempt here to induce this Court to weigh a fragmentary part of the evidence to the exclusion of more pertinent evidence contained in the record.

It is also noteworthy that insofar as appellant’s argument is concerned with respect to (a) above, it has cited no legal authority to support its right to raise the question on appeal. It is submitted that there is no valid authority permitting appellant to do so. The authority cited to support ground (b) above (App. Br. pp. 115-133) likewise is devoid of any adjudicated decisions supporting appellant’s right to have this Court review this ground of the motion for a new trial. The cases cited in this portion of appellant’s brief relate merely to general principles which are wholly inapplicable to the evidence in the instant appeal. Again, for the purpose of avoiding a repetition of argument contained elsewhere herein this Court’s attention is directed to sections I, II, and V of appellees’ brief.

V.

Appellees' Answer to Contention That "Damages Were Excessive" and to the Contention That "Numerous Errors Were Committed in Connection Therewith." (Points 11, 12, 13.)

Alleged Excessiveness of Verdict Is Not Reviewable.

In its argument under this point appellant asserts that the damages assessed by the jury (\$50,000) are excessive. It is clear that there can be no doubt of the fact of damage since that part of the conspiracy aimed at appellees had as its sole and only object, purpose, and effect the permanent elimination of appellees' ability to compete in the market place with Flintkote's co-conspirators. The latter element—the fact of damage—is not disputed in the record and is ignored in the argument of appellant.

The verdict of a jury based on evidence as to the amount of damages suffered is not reviewable by a Federal Appellate Court. The law on this subject is carefully stated and reviewed in *St. Louis Southwestern Ry. Co. v. Ferguson*, 182 F. 2d 949, where Judge Johnsen, speaking for the Court, says [954]:

"The final contention is that the verdict is so grossly excessive as evidently to have been the result of sympathy, passion and prejudice. We have said many times that the excessiveness or inadequacy of a verdict is not a question for our consideration, but that the entreaty for any such vice lies solely to the judgment and the conscience of the trial judge on motion for new trial. This is because the amount of a verdict is primarily a factual evaluation on in-absolute elements, while our function traditionally has been regarded as extending only to a testing

of the soundness of the processes by which such a result has been achieved.”

To the same effect see: *Lawlor v. Loewe*, 235 U. S. 522.

As a general rule in tort cases it must be recognized that it is the exclusive function of the jury to fix the amount of damages, and that Courts will not interfere with the jury's verdict merely because the amount of the verdict is large or because they take a different view of the case or would have awarded more or less damages.

Thornwalt v. Reading Co., 79 Fed. Supp. 921, 15 Am. Jur., Sec. 205, p. 622;

Barry v. Edmonds, 116 U. S. 550, 6 S. Ct. 501;

Tenant v. Peoria & P. U. Ry. Co., 321 U. S. 29, 64 S. Ct. 409.

As has been pointed out *the fact* of damage is clear and cannot be controverted herein. An analysis of appellant's argument will disclose that its sole contention relates to the measurement of damages.

When damage is caused by a tortious act, the damage from the tortious act may continue in the absence of proof of a continuation of the conspiracy itself which caused the damage or injury. Thus one must distinguish between the cause of damage and (1) the time during which such damage may continue and (2) the amount of damage resulting from the tortious act. To illustrate, it has been held in certain motion picture cases, and correctly so, that the damage resulting from a conspiracy to prevent the plaintiff from playing pictures on a competitive run and availability is measured from day to day and is governed by the applicable statute of limitations and the damage proceeds only to the date of the filing of the complaint. On the other hand, when a single act of a conspiracy causes the damage to an individual theatre,

the time element and the measure of damage is vastly different. Thus we have the *Bigelow* case which involved the former principle (*Bigelow v. RKO Radio Pictures, Inc., et al.*, 327 U. S. 251). There the plaintiff sued for damages based upon a late playing position and was permitted to recover damages accruing within the statute of limitations and up to and including the date of filing of plaintiff's complaint. Subsequently and after approximately three years of appeal, plaintiff filed an entirely new suit and recovered damages during the later period upon the basis that the conspiracy continued during such period to his damage. The other type of situation is illustrated in the *Brookside* case. See *Twentieth Century-Fox Film Corporation, et al. v. Brookside Theatre Corporation*, 194 F. 2d 846, 854-855. In the latter case the plaintiff was compelled to dispose of his theatre to one of the defendants in the year 1937, as a result of the overt acts of the conspiracy preventing plaintiff from playing motion pictures in competition with competitors. No amended or supplemental complaint was filed in the case, the damage being based upon a single overt act in the conspiracy; namely, the compulsion under which plaintiff disposed of its property, the Brookside Theatre. The trial of the case ended on December 28, 1950, after having been transferred from this district to the Western District of Missouri for trial. Thereafter final briefs to the Eighth Circuit Court of Appeals were filed on September 17, 1951, and the instructions of the trial court were expressly brought into issue; the Supreme Court of the United States denied certiorari. (343 U. S. 942, 96 L. Ed. 1348, 72 S. Ct. 1035.)

The *Brookside* case is in no wise an isolated opinion or rule of law, but rather it states the regularly accepted and universal rule of law excepting only in those cases in which the damage is suffered day by day as a result of a continuing day by day conspiracy. For example, in cases

where plaintiffs have been prevented from going into business at all, the Court has held that the estimated future damage resulting may be approximated upon the basis of any adequate evidence. Thus in *Pennsylvania Sugar R. Co. v. American Sugar R. Co.*, 166 Fed. 254, 260, the Court held that while something more than a mere intention to go into business was necessary; that when that intention has been expressed in substantial acts, an estimate of the amount of money actually lost in the enterprise cannot be regarded as wholly speculative or problematical.

Again, in *Aladdin Mfg. Co. v. Mantle Lamp Co. of America*, 116 F. 2d 708, 716, 717, the Court held that

“A tortfeasor is liable for all consequences naturally resulting, all injuries actually flowing from his wrongful act, whether in fact anticipated or contemplated by him when his tortious act was committed.

“Recoverable damages, therefore, include compensation for all injury to appellant’s business arising from wrongful acts committed by appellee, provided such injury was the natural and proximate result of the wrongful acts (citing cases). This includes injury to business standing or good will, loss of business, additional expenses incurred because of the tort and all other elements of injury to the business. 15 Amer. Jur. secs. 133, 134, 135, 136 and 138. These are governing principles applying to compensatory damages. * * * Whether damages be compensatory or exemplary, if unliquidated, when determined by the trier of the facts, their propriety cannot be governed or measured by any precise yardstick. They must bear some reasonable relationship to the injury inflicted and the amount must rest largely in the discretion of the trier of facts, a discretion not to be arbitrarily exercised. Ordinarily

this court will interfere only where it appears that an injustice has been done or it is clear that there has been error in law.”

In other words, once having found the *fact* of damage, the jury in a treble damage action may use its discretion as to the amount of damage in the identical way in which such discretion is used in a personal injury case and similar matters, including the future period of time in which the damage may persist.

In the *Brookside* case, *supra*, the Circuit Court of Appeals for the Eighth Circuit stated:

“The measure of such damages is the pecuniary loss to plaintiff’s business or property resulting approximately from the conspiracy or combination
* * * The uncertainty, however, which precludes the recovery of particular damages is uncertainty as to whether they are the result of the tortious acts of defendant, rather than uncertainty as to amount, and the fact that damages cannot be calculated with mathematical exactness does not make them so uncertain as to bar recovery (citing cases). Hence, loss of profits may constitute an element of recoverable damages where they are capable of being measured or ascertained on a reasonable basis.”

In the same case the defendants or appellants objected to the admission of evidence showing loss of future profits, maintaining that future profits in themselves are not an element of recovery, and that:

“The amount of the profits beyond a reasonable period after the sale (of the theatre) in 1937 should not be considered.”

The trial court permitted the plaintiffs (in *Brookside*) to estimate damages up to and beyond this point and for a number of years after the filing of the complaint

and trial. Appellate court approved the instruction given in this respect (certiorari denied by the Supreme Court).

Other statements of the principle involving the time element in which unliquidated damages may be considered and proven are numerous. See for example: Restatement of the Law-Torts, pages 906-908, where it is stated:

“In determining the measure of recovery * * * a balance sheet is in effect set up by the court in which are stated the items of assets and liabilities which have been affected by the tort, (a) before the tort, and (b) as they appear at the time of trial. * * *”

The Appellate Court in the *Brookside* case further recognized this proposition of future loss of profits by the following language:

“The value of the right to continue business, of which the plaintiff was deprived by the wrongful act of the defendants, depended certainly to some extent on its capacity to make a profit. * * * If profits might reasonably be realized from a conduct of a business destroyed by the tortious act of the wrongdoer may not be taken into consideration in ascertaining damages, then the wrongdoer might with impunity destroy a competitor’s business and profit by such act.”

See for example, *Allison v. Chandler*, 11 Mich. 542, where through repeated tortious acts plaintiff was compelled to abandon his business and sued to recover damages, including lost profits to the end of his leased term. See also *Chapman v. Kirby*, 49 Ill. 221, cited and approved in *Weinman v. de Palma*, 232 U. S. 571.

Finally, Mr. Justice Cardozo in *Sinclair Refining Co. v. Jenkins Petroleum Process Co.*, 289 U. S. 689, stated:

“At times the only evidence available may be that supplied by testimony of experts * * *. But a

different situation is presented if years have gone by before the evidence is offered. Experience is then available to correct uncertain prophecy. Here is a book of wisdom that courts may not neglect. We find no rule of law that sets a clasp upon its pages and forbids us to look within."

Here, as in the *Brookside* case, the damage to appellee's business and property was accomplished by the act of the defendants on or about February 19, 1952. The results of said act (the termination of plaintiff's supply of competitive tile) and the damages therefrom have continued and have been accruing to the present date. Indeed, under the instructions in the *Brookside* case, it would seem that since there is no limitations other than ordinary mortality tables upon which to judge the time in which plaintiffs might have continued to operate their business profitably in the absence of defendants' acts there would seem to be no valid reason to compel the trial court here to limit the damages to the time of trial. In a motion picture treble damage action the damages are usually measurable upon the basis of the location, size, and accompaniments of the particular theatre directly involved, irrespective of the lease or the longevity of management or ownership. Thus, laying the two cases side by side, they can be distinguished only by the fact that whereas the plaintiffs in the *Brookside* case were permitted to prove continuing loss of profits and other damage elements up to and including the end of their lease on the Brookside Theatre which terminated in the year 1952, in the present case appellees' business rather than being predicated upon a particular building and its desirability or upon a particular lease of that building, is predicated upon their continuing ability to engage in the acoustical tile business and the continued utilization of their past experience, etc.

The following are general illustrations of types of damage recognized in antitrust cases:

It is settled that the injury to business or property referred to in the antitrust acts including diminution of property as a result of having been led to pay prices in excess of those which would have prevailed but for the illegal combination or conspiracy.

Montague & Co. v. Lowry, 193 U. S. 38;

Chattanooga Foundry v. Atlanta, 203 U. S. 390;

Thomsen v. Cayser, 243 U. S. 66;

Straus v. Victor Talking Machine Co., et al., 297 Fed. 791;

Monarch Tobacco Works v. American Tobacco Co., 165 Fed. 774.

As said by Justice Holmes in the *Atlanta* case,

“A man is injured in his property when his property is diminished” (p. 399).

In the *Montagu* case, *supra*, plaintiff retailer was compelled to pay higher wholesale prices as a result of a retail association's activities. In an action against the association he was permitted to measure his damages on the tile which he had purchased by the difference between the list price and the association price, approximately fifty per cent off list.

Again, in the *Atlanta* case, *supra*, plaintiff's damage was measured by the difference between the price he had to pay and the price he would have had to pay under natural conditions had the combination been out of the way.

In *Thomsen v. Cayser*, *supra*, plaintiff's damages were based upon the difference between the rates charged by the combination and those which he would have otherwise been required to pay.

In the *Straus* case, *supra*, plaintiffs were retailers (principally Macy's of New York) to whom defendants had refused to sell goods at dealers' discounts because of Macy's refusal to participate in defendants' illegal licensing scheme. In order to obtain goods, Macy purchased both from defendants and others at a higher price and the same measure of continuing damages were used.

Again, in *Eastman Kodak Co. v. Southern Photo Co.*, 273 U. S. 359, plaintiff's established business of selling supplies to professional photographers was greatly decreased by the refusal of the defendant, which had a partial monopoly in such supplies, to sell to it. In this case, the defendant conceded that the loss of anticipated profits may be recovered where the amount of loss is made reasonably certain by competent proof. The Supreme Court adopted the language of the Court of Appeals as a correct statement of the applicable rules of law:

"The plaintiff had an established business, and the future profits could be shown by past experience. It was permissible to arrive at net profits by deducting from the gross profits of an earlier period an estimated expense of doing business. Damages are not rendered uncertain because they cannot be calculated with absolute exactness. It is sufficient if a reasonable basis of computation is afforded, although the result be only approximate."

Further, the Supreme Court added:

"* * * a defendant whose wrongful conduct has rendered difficult the ascertainment of the precise damages suffered by the plaintiff, is not entitled to complain that they cannot be measured with the same exactness and precision as would otherwise be possible. *Hotel v. Baltimore & Ohio R.R.*, 169 U. S. 26, 39. And see *Lincoln v. Orthwein* (C. C. A.), 120 Fed. 880, 886.

“We conclude that plaintiff’s evidence as to the amount of damages, while mainly circumstantial, was competent; and that it sufficiently showed the extent of the damages, as a matter of just and reasonable inference, to warrant the submission of this question to the jury. The jury was instructed, in effect, that the amount of the damages could not be determined by mere speculation or guess, but must be based on evidence furnishing data from which the amount of the probable loss could be ascertained as a matter of reasonable inference” (p. 379).

Normal anticipated increase in future business, where a plaintiff has been either stopped from conducting business or substantially restricted, is a recognized measure of unliquidated damages in suits of this kind, and the measure of this loss may be proven by expert testimony, including plaintiffs’ own opinion based upon some reasonable thesis. Thus, in *Sheldon v. Moredall Realty Corp.*, 29 Fed. Supp. 729, 732, directors and managers of similar theatres in the neighborhood of the Capitol Theatre testified as experts for the respondent on the added patronage a motion picture theatre might get by supplementing its program with vaudeville, the Court holding according to the general rule that any objection to this type of evidence related solely to its weight, not to its admissibility.

The case of *William R. Rankin Co. v. Associated Bill-posters, etc.*, 42 F. 2d 152 (C. C. A. 2) is another example of plaintiffs using expert testimony and judgment in estimating damages. There the plaintiff was prevented from engaging fully in the outdoor billboard business because of the tortious acts of defendants. The Court permitted Rankin, the plaintiff, to testify and give his best estimate, not only of the loss occasioned by those acts, but as to damage occasioned by his loss of what he considered would have been the normal increase in his business from year

to year in the absence of such tortious acts. He was permitted to estimate on this basis his probable yearly earnings to explain how his figures were arrived at. The Court stated with respect to this type of testimony:

“There was no speculation as to the fact of actual damage, its business had been seriously curtailed. The defendants had caused the damage, and cannot be permitted to escape liability because it is difficult for the plaintiff to express in terms of dollars the damage it has suffered.

“This evidence while purely an estimate and introduced as such was proof of a kind of definite and certain as the subject matter admitted. It had to do with what was never actually earned because of the defendants’ wrongdoing. * * * Whatever may be said of its weight and that was entirely for the jury, we have no difficulty with its admissibility.”

In the case of *Frey & Son. v. Welch Grape Juice Co.*, 240 Fed. 114, 117, the District Court limited the measure of damages to the profit the plaintiff would have made on two particular orders proved to have been given to the plaintiff which it was unable to fill. The Appellate Court denied this limitation and stated:

“This damage could not as a matter of law be confined to the loss of profits or specific sales which the plaintiff might be able to prove; for in such case when a merchant’s business is broken into, it would ordinarily be impossible for him to know and prove all specific sales he had lost.”

Again, with respect to “normal expected increase in business” in the case of *Johnson v. Joseph Schlitz Brewing Co.*, 33 Fed. Supp. 176, 182, the Court stated:

“Among the many other items of damage properly assessable, improved trade for plaintiff if the restraint were removed is one.”

Citing

Montague v. Lowry (9th C. C. A.);

Ellis v. Inman Poulson & Co. (9th C. C. A.); and

Story Parchment Co. v. Patterson Co., 282 U. S. 555.

See also regarding latitude of proof of damage, *Speegle v. Board of Fire Underwriters*, 29 Cal. 34, 46, citing and quoting *Bigelow v. RKO Radio Pictures, Inc., et al.*, 327 U. S. 251.

The Circuit Court of Appeals' opinion in the *Brookside* case, *supra*, recognizes the foregoing established principles of law. There, as here, the appellant in arguing the question of admissibility of certain evidence commingled with criticisms of the Court's instruction and ultimately in this connection argued the question of alleged excessiveness of the verdict (p. 855). There, as here, the question of the measure of damages was based largely, if not entirely, upon the testimony of expert witnesses operating similar types of theatres and the Court stated with respect to similar objections as are raised here:

“* * * After testifying that he had made a study of the records that were exhibited covering this period of operation, he was interrogated as to the gross receipts for each of the years. This was objected to on behalf of the defendants as being ‘inadmissible on any subject of damages and further that the profits themselves are not any element of recovery and that the amount of the profits beyond a reasonable period after the sale in 1937 should not be considered.’ ”

With respect to the measurement of damages the Appellate Court in the *Brookside* case further stated:

“* * * The measure of such damages is the pecuniary loss to plaintiff's business or property re-

sulting proximately from the conspiracy or combination. They must be actual damages and not speculative or conjectural. The uncertainty, however, which precludes the recovery of particular damages is uncertainty as to whether they are the result of the tortious acts of defendants, rather than uncertainty as to amount, and the fact that damages can not be calculated with mathematical exactness does not make them so uncertain as to bar recovery. *Bigelow v. RKO Radio Pictures*, 327 U. S. 251, 66 S. Ct. 574, 90 L. Ed. 652; *Eastman Kodak Co. v. Southern Photo Materials Co.*, 273 U. S. 359, 47 S. Ct. 400, 71 L. Ed. 684. Hence, loss of profits may constitute an element of recoverable damages where they are capable of being measured or ascertained on a reasonable basis.”

Finally, the Court there stated:

“* * * In view of the verdict of the jury we must assume that plaintiff was forced out of business by the tortious acts of the defendants. True, the cause of action for such wrongful acts arose at the time such wrongful acts were consummated,* and plaintiff could at any time thereafter, within the period of limitations, have sued to recover the damages suffered.”

In *Bordonaro Bros. Theatre v. Paramount Pictures, et al.*, 176 F. 2d 594, the Court held in a motion picture case that:

“Damages in such a situation necessarily cannot be asserted with mathematical precision; but the testimony of plaintiff’s expert witness, Samuelson, ‘while purely an estimate and introduced as such, was proof

*Here the wrongful acts were consummated on or about February 19, 1952.

of a kind as definite and certain as the subject-matter admitted.' *William H. Rankin Co. v. Associated Bill Posters of U. S. and Canada*, 2 Cir., 42 F. 2d 152, 155, certiorari denied *Associated Bill Posters of U. S. and Canada v. William H. Rankin Co.*, 282 U. S. 864, 51 S. Ct. 37, 75 L. Ed. 765. Defendants must not be allowed to create their own immunity by the extent and duration of their conspiracy."

The principle is also well established that "in action for damages for exclusion from business controlled by defendants damages suffered after decree finding defendants guilty may be recovered thereof resulting from unlawful acts done before such decree." On the general principle enunciated in *Lawlor v. Lowe*, *supra*, and similar cases, see also *American Mine Workers of America v. Dowd*, 242 U. S. 653, 37 S. Ct. 246; *American Banana Co. v. United Fruit Co.*, 166 Fed. 261 (affirming 160 Fed. 184), and similarly see *Speagle v. Underwriters*, 29 Cal. 34, 36.

Again, in the recent case of *Kobe, Inc. v. Dempsey Pump Co., et al.*, 198 F. 2d 416, cert. den. 73 S. Ct. 46, the Court followed the uniform doctrine with respect to measurement of damages in tort actions.

"* * * To sustain the amount of the damage, *Dempsey and Specialty* produced all the evidence available under the circumstances. They showed that they had the facilities, the personnel and the finances to manufacture and market the *Dempsey* products. They had elaborate surveys and samplings of the market and the demands for this product prepared by experts. One expert with long experience in the field in marketing hydraulic pumps and who knew the *Dempsey* pump and its performance as compared with others, testified that in his opinion *Dempsey* would have sold considerably more pumps and auxili-

ary equipment than that allowed by the court had there been no interference on the part of Kobe. These experts believed that the growth curve of the Dempsey product would have continued upward over the period in question principally because of the pump's performance and its price. In view of all the evidence, including the fact that during the relevant part of 1948, Kobe averaged 45 installations per month and 23 per month for all of 1949, it would appear that the trial court took a conservative estimate when it found that except for the Kobe interference, Dempsey and Specialty would have sold six of the smallest and lowest priced pumps per month for the period in question." (Emphasis added.)

In *Bigelow v. RKO Radio Pictures Inc., et al.*, 327 U. S. 251, 66 S. Ct. 574, 99 L. Ed. 652, a leading case on the measure of damages, plaintiff sued for treble damages under the antitrust act, claiming that defendants, by conspiracy, had prevented plaintiff's theatre, the Jackson Park in Chicago, from playing on the run to which it was entitled. Plaintiff claimed that the measure of his damage was the benefit that he would have made if he had been allowed to operate his theatre on the run to which he claimed he was entitled. To prove the amount of this loss, he introduced comparison figures of other theatres and of his own theatre. The District Court allowed the damage claimed, but the Circuit Court of Appeals reversed on the ground that the damage claimed was too speculative.

The Supreme Court, in reversing the Seventh Circuit Court of Appeals and directing reinstatement of the judgment of the District Court, pointed out that "*the fair value of petitioner's right thus to continue their business depended on its capacity to make profits.*"

The Court pointed out that it was resting its decision on settled principles of law, and that in cases of this character, where the tortious acts of the defendants preclude a more precise ascertainment of the damages, every principle of justice and public policy requires that the wrongdoer bear the risk of the uncertainty involved. Note carefully the Court there speaking of a case where there were no evidential facts upon which to compute the amount of lost profits except *comparison* of other theatres with plaintiff's theatre.

While the cases are legion on the point of measurement of damages, this Court's attention is directed to the case of *People's Ice Co. v. Steamer Excelsior*, 44 Mich. 229, for a most enlightening and complete discussion and answer to appellant's position here. The quotation is not quoted herein because of its length, but the Court's attention is expressly directed to the Court's comments commencing at page 236 of the opinion.

In *Chapman v. Kirby*, 49 Ill. 211, cited with approval and followed in *Weinman v. De Palma*, 232 U. S. 571, 34 S. Ct. 370, 58 L. Ed. 733, plaintiff's business, conducted on leased premises, was interrupted by wrongful act. Chapman, confronted with the inability to operate, sold his plant and closed out his business and sued to recover his damage, claiming that such damage consisted of the profits he would have earned except for the interruption and destruction of his business. His contention was sustained.

"It cannot be held that, * * * appellee should remain inactive, hold his machinery, unfinished stock and fixtures, until the end of his term, * * *. *No rule of law or principle of justice could require such a course.* * * * The person thus wronged is entitled to recover, for all of the injury he has sustained. * * * And of what does this loss consist, but the profits that would have been made had

the act not been performed by appellants? * * * Nor is there any force in the objection, that appellee was confined to the value of his lease from the time the power was withheld * * *. Appellees had sold out, his business was destroyed, and he was not bound to re-establish his business, when he had no assurance that it could be continued during the remainder of his term. * * * *He was not bound to suppose appellants would be more disposed to regard his rights in the future than they had been in the past.*" (Emphasis added.)

Appellant's Authorities Are Inapplicable.

Authorities cited by appellant are not contrary to the established law as it applies to the facts in the case at bar. For example, the *Lawlor* case, the *Connecticut Importing Co.* case (App. Br. p. 101), and the *Frey & Son* case (App. Br. p. 104) all recognize the proposition of law that a plaintiff in a treble damage action may recover damages for all injuries flowing from any act occurring prior to the filing of the complaint, whether the damage continues to or beyond the actual trial date of the case.

The motion picture cases cited by appellant have been distinguished hereinbefore in that they apply to a situation where there is in fact a day to day refusal to sell or license a motion picture to an exhibitor for exhibition on the day or days requested. They do not involve a termination of supply of motion pictures nor a refusal to sell or license. They involve merely a day to day or week to week refusal to license the pictures on the basis desired by the exhibitor. Hence, they are not in conflict with cases cited by appellees and are inapplicable to a situation such as here where appellant by a single overt act of the conspiracy—the act of terminating permanently appellees' source of supply—was the single and only act causing appellees' injury. Therefore, it is immaterial for the purposes of this appeal

that the conspiracy to monopolize and control the sale and installation of acoustical tile may have been a continuing one or may in fact still exist. The pertinent point is that appellees' damage was occasioned by a single overt act of that conspiracy.

By and large Flintkote's argument with respect to damages ignores the obvious finding of the jury that Flintkote knowingly and illegally participated in a conspiracy to eliminate appellees' competition in the purchase and sale of acoustical tile in the area involved. In its argument appellant thus seeks to ignore the direct and inevitable and intentional effect of its individual acts in furtherance of the conspiracy by directing this Court's attention only to an alleged insufficiency of the evidence to show Flintkote's knowledge of other aspects of the overall conspiracy as it related to bid allocation and price fixing among the co-conspirator contractor defendants.

Summary of Evidence on Measurement of Damages.

The verdict of the jury in the amount of \$50,000 is not only supported by the evidence, but there is no evidence to the contrary. *Appellees were the only ones who offered any evidence on the amount of damage suffered.*

The record in the instant case shows little, if any, dispute with respect to the following evidence regarding the measurement of damages suffered by appellees:

(1) Appellees spent considerable time and effort in the San Bernardino area and in the Los Angeles area in promotional and organizational work in setting up the aabeta co. [R. 216-217]; (2) there was no attempt by appellant during the course of the trial to rebut the former sales capacity of either appellee based upon past sales experience of approximately one carload of acoustical tile per month; (3) there was no effort or attempt during the course of the trial or in the record to rebut the formula

testified to by appellees with respect to the profits and sales commissions resulting from the sale of a carload of acoustical tile; namely, \$5400 out of \$18,000 derived from the installed price of a carload of acoustical tile; (4) there was no substantial dispute regarding appellees' or either of the appellees' past performance, expertness, or ability as acoustical tile salesmen; (5) there is absolutely no dispute in the record regarding the fact that appellees were incapacitated insofar as their ability to compete without an assured direct source of approval acoustical tile after February 19, 1952 [R. 270-276, 1210-1211]; (6) there was no dispute in the record or any attempt to dispute appellees' evidence regarding the fact that they were compelled to pay 17% more for an uncertain and non-competitive source of acoustical tile after their direct source had been permanently terminated on or about February 19, 1952; (7) there was no attempt during the course of the trial to attack the validity or the accuracy of Exhibits 38 and 39 either with respect to the formula represented there or the supplementing expert testimony of appellees with respect to such formula of profit. This, in spite of the fact that appellant called as its own witnesses the representatives of all of the contractor co-conspirators excepting only principal representatives of the Downer Company—appellees' former associates. (8) The fatuous nature of appellant's argument charging that appellees during the period from July, 1952, up to and including the date of the trial, sold less than a single carload of tile per month is, of course, apparent in view of the fact that they were compelled to rely upon "bootleg" sources at enhanced and noncompetitive prices, consisting largely of competing tile contractors for an uncertain source of acoustical tile. In other words, they were during this period operating under the admitted restraints of the conspiracy.

The jury's verdict of \$50,000 was in view of all of the circumstances a most conservative one. In weighing the

evidence as it had a right to do, the jury obviously discounted many of the admissible and relevant factors going into the measurement of the damages actually suffered.

Accepting the undisputed testimony in the record that the average carload of acoustical tile purchased directly from the manufacturer at the uniform price prevailing throughout the area, has an installed price of approximately \$18,000, and that 30% of this \$18,000 consists of 10% overhead costs, 10% net profit to the contractor, and 10% sales commission, the net past admitted sales performance of each appellee in an amount in excess of \$1200 per month would represent an approximation of a sale by each appellee, based upon past performance, of one carload of tile per month. The undisputed evidence further shows that each appellee would have, under his own business management, continued to sell not less than his past sales for other companies, and that each appellee would have received not only the 10% sales commission constituting his past earnings of \$1200 per month, but would have also received a like amount constituting the net profit to the acoustical tile contractor, or at least double the amount of \$1200 per month, or for both appellees a profit of \$4800 per month. In any event, the jury's verdict of \$50,000 found ample support in the evidence without regard to the undisputed expert testimony with respect to the normal growth of appellees' business, and the jury by its verdict kept well below the minimum damage based upon the sale of only one carload of tile per month by both appellees.

The conservative character of appellees' testimony and Exhibits 38 and 39 with respect to damages arising out of lost profits is illustrated by way of comparison with an examination of appellant's Exhibit J which shows that the defendant Acoustics, Inc., a relatively inexperienced newcomer in the acoustics field, sold during the first partial year of 1952 approximately \$64,000 worth of

Flintkote tile in addition to its sale of Firtex, a competing approved tile [R. 838-839, 851]. \$64,000 equals the price of approximately 12 carloads of tile [R. 1079-1081]. It is submitted that with appellees' admitted experience, contacts, and proven ability [R. 1062] their sales potential was at least as great as Acoustics, Inc.

It is true that suit could have been brought immediately and the damage which appellees had suffered as a result of Flintkote's tortious act estimated and fixed by the jury on the best evidence then available. The amount of damage appellees had suffered by being driven out of the competitive market does not continue to accrue or enlarge year after year *ad infinitum*; it never changes; it is neither enlarged nor diminished by the date of filing suit or the date of trial. In the instant case the trial court and the jury terminated the measure of this damage as of the date of the trial—under the law it need not have been so terminated, but the jury may have been permitted to find damage so long as the evidence in the case may have indicated that the appellees would continue to try to do business as a partnership in the future, even beyond the date of the trial.

At the time of trial it is clear that appellees were still operating as a partnership, were still under the competitive limitations resulting from the conspiracy; were still attempting to "keep their heads above water" by the purchase and installation of tile for which they were admittedly compelled to pay a high and non-competitive price for an uncertain supply, were continuing to operate as a partnership by resorting to other lines of building activity to supplant their acoustical tile business for which they were qualified and which had been destroyed by the conspiracy. It is also undeniable that at the date of trial appellees were still disabled, through lack of an assured source of A. M. A. approved tile to bid or otherwise compete for the large jobs from contractors they

had regularly and successfully dealt with in the past. Therefore, the element of speculation as to the amount of damages, which at the time of trial, may have been suffered in the future as a result of the appellant's acts was eliminated by the Court's decision to limit damages to the date of the trial. It will be further noted that other features of damage which originally may have been speculative had been eliminated at the time of trial as compared to what would have been the duty of the jury had the case been tried immediately upon the filing of the complaint or at the time when the act resulting in damage occurred in February, 1952. At the latter date the jury would necessarily have had to speculate on the following elements of damage which were not present at the time of the actual trial; namely (1) whether or not the appellees would continue to function as an expert partnership; (2) whether or not appellees would or would not have been able to obtain a direct line of supply from other manufacturers of A. M. A. approved acoustical tile; (3) whether or not the partnership may have discontinued for other reasons, and (4) whether or not the partnership may have been terminated or rendered unfeasible by reason of the death of one partner, or for other reasons.

Actually, the Court's charge to the jury with respect to damages was eminently fair and considerate of appellant. The Court charged that the jury could not take into consideration any punitive damages resulting from public injury or otherwise; that in any event they could compensate appellees only for loss to their business, and that the jury could not take into consideration any idea of punishment [R. 1250]. The Court further charged that even if the jury found for plaintiffs their finding as to damages must be limited only to the finding of actual damages which plaintiffs have suffered as a result of the conspiracy; that the plaintiff in an antitrust action can

recover damages for injury to its business or property which does not include damages for embarrassment, humiliation, etc.; that the defendant is liable only for all consequences naturally resulting, or injuries flowing from his wrongful act; that recoverable damages for such wrongful act would include compensation for all injury to plaintiffs' business arising therefrom provided such injury was the natural and proximate result of said wrongful acts; that if the jury found that this was a case for damages they should bear in mind that the damages would be limited to compensation for injury to plaintiffs' business arising from the acts of the defendant; that these damages could include injury to business, standing, or good will, to loss of business which would otherwise have been enjoyed by plaintiffs, to additional expenses incurred because of the tort; that "plaintiffs' recovery in this action, if any, must be limited to damages resulting from the inability of plaintiffs to purchase acoustical tile from Flintkote on a direct basis during the period February 19, 1952, to the time of the beginning of the trial" [R. 1251-1254]. As has been pointed out elsewhere in appellees' brief, these instructions were not objected to and were in fact therefore approved by appellant except insofar as appellant's proposed instructions 46A-46F involved an entirely different theory of law [R. 1257]. Finally, it is apparent that the entire issue in the case revolved around the sole question of whether Flintkote's tortious act of terminating appellees' source of supply was the result of conspiracy or otherwise. This being so, the issue was a simple one, and the Court's instruction to the effect that damages, if any, could only be assessed between the dates of February 19, 1952 (the date of termination) to and including the date of the trial, was fair and could not have been confusing in any way to the jury. The entire damage was based upon a single act—Flintkote's termination of appellees' only available supply of accredited tile. It is also abundantly clear from the record that appellant at no

time during the trial made any contention other than that its termination of appellees' supply was single, definite and final. The idea that it was otherwise is obviously an unfounded attempt to bring the case within the language of those dissimilar and inapplicable cases dealing with continuing day to day partial restraints such as were involved in the *Bigelow* and other motion picture cases of that type.

VI.

The Attorney's Fees Awarded to Appellant by the Trial Court Were Reasonable.

(Specification of Error No. 14.)

The trial court's award of attorney's fees was based upon the usual factors observable by a trial court during the course of a trial and by stipulation of the parties upon the Petition for Attorney's Fees and Exhibit A, Schedule of Time appended thereto [R. 105-113] and Memorandum of Points and Authorities in opposition to such petition of the defendant.

We do not deem it necessary in this Reply Brief to rely upon anything other than the usual yardstick of measuring fees in antitrust or other cases, or in fact other than the most basic criteria contained therein. In the instant case the Petition for Attorney's Fees requested a total fee of \$40,000 based upon the formula of \$40 per hour for time spent outside of the courtroom and \$250 per day spent in Court. Appellant does not deny seriously that this rate of pay is reasonable for a senior member of the bar in the City of Los Angeles in the type of litigation involved in this case. They merely say that such a schedule of fees "seems on the high side, but we are prepared to agree that \$30 to \$40 per hour and \$200 to \$250 for a court day for the services of senior members of the Bar could probably be supported * * *"

(App. Br. p. 136). Thus, the appellant substantially admits the reasonableness of the formula in arriving at the requested \$40,000 fee. Appellees' counsel is of the age of 52 years and has since approximately the year 1934 been constantly engaged in the litigation of antitrust cases and in general court work. Appellant does not contend that appellees' attorney was not a senior member of the Bar.

It is clear from the cases, and it might be admitted for purposes of this argument, that the amount of recovery in an antitrust case does not constitute a principal factor in arriving at a reasonable fee. Thus, in the case of *E. A. Lynch, Trustee, etc. James Bankrupt v. 20th Century Fox Film, et al.*, No. 12976-HW, decided within the last year by Judge Harry Westover, in the Southern District, Central Division of California, an attorney's fee of \$15,000 was awarded in a case where the jury returned a nominal verdict of \$1,000. Similarly, in the case cited by appellant in its brief, *Village Theatre v. Paramount Film Distributing Corp.*, 228 F. 2d 721, Judge Ritter awarded a fee of \$27,500 after a jury verdict of \$20,000.

Appellant apparently admits that a \$20,000 fee would have been reasonable (App. Br. p. 137). We think that the difference between appellant's opinion as to the reasonableness of the difference between \$20,000 and the \$25,000 actually awarded by the trial court could be explained and justified aside from the mathematical computation of the time in and out of the Court, by the trial court's observations during the course of the lengthy trial. Moreover, if we accept appellant's own formula as to the value of a senior attorney's time and give full credit to appellant for the 45 hours of office time consumed during court days by appellees' counsel either in the early morning or in the late evening, and deduct these 45 hours from the total of 515½ hours of office time,

the result would be that appellant's idea of a reasonable fee would amount to approximately \$24,270. The difference of \$930 certainly would form no basis for this Court finding an abuse of the trial court's discretion in awarding the \$25,000 fee.

Finally, appellant finds no serious quarrel with appellees' contention that two-third's or three-quarters of a court day should be paid for as a full day, but as pointed out above, denies that in addition thereto extra office time should be accounted for. This Court will, of course, take notice of the fact that an attorney's day whether in court or out of court ordinarily does not consist of nine or more hours' effort per day. Appellees' affidavit attached to their Petition for Attorney's Fees [R. 108-113] shows without dispute that the 45 hours of office time consumed by their counsel during the 21 days of trial was time when added to the two-thirds or three-quarters court day brought the total working day considerably above the normal working day for a practicing attorney. This would be especially true where the 45 hours objected to elongated the ordinary strenuous trial day and where, as here, many of the office hours were spent on Saturdays, Sundays, or other normal holidays.

Certainly, the Court could and should have taken these extraordinary long days and holiday labors into consideration in fixing the attorney's fee, at least to the extent of accounting for the \$930 about which appellant is apparently complaining on this appeal.

VII.

The Trial Court's Disposition of the \$20,000 Received in Consideration of the Covenant Not to Sue Was Correct.

The memorandum of the decision of Judge Tolin adequately sets forth the law relating to this alleged assignment of error [R. 116-124]. Appellees rely upon this memorandum decision and adopt the same as its argument on this appeal. Additionally, this Court's attention is called to the following additional decisions. In the case of *Winckler & Smith Citrus Products Company, et al. v. California Fruit Growers Exchange, et al.*, No. 13788-C, decided on March 5, 1956, Judge James M. Carter adopted and followed the reasoning and result of Judge Tolin's decision in disposing of a similar consideration for a covenant not to sue in that case.

The Court's attention is further called to the case of *Western Spring Service Co. v. Andrew*, 229 F. 2d 413, in which the Court correctly pointed out the general principle adverted to in Judge Tolin's decision in the instant case. There the Court stated in connection with ordinary tort cases (not involving statutory trebling of damages) that:

“While the Court in those cases does not set out the reason why such sums must be applied in mitigation of damages, it no doubt was done under the principle of unjust enrichment, that the plaintiff was entitled to only one full measure for the injuries suffered.”

Appellant's argument to the contrary would, of course, reverse and distort the principle of unjust enrichment in this case by turning the purpose and benefits of the anti-trust acts as they relate to private treble damage actions to the benefit of the defendant rather than the plaintiff. This is, of course, clearly pointed out in Judge Tolin's de-

cision. To hold otherwise would, as previously stated, result in unjust enrichment to the guilty party, contrary to common justice and the clear intent of the statutory public policy of the antitrust acts.

Appellant has cited a number of cases, none of which are contrary to the appellees' position and none of which in any wise substantiate the appellant Flintkote's position. The case of *Clabaugh v. Southern Wholesaler Grocers Association* (C. C., N. D., Ala. 1910), 181 Fed. 706, does not apply. A reading of the case fails to disclose any direct bearing or indeed any bearing whatsoever upon the question. In the *Clabaugh* case the Circuit Court held only that there had been full payment for the tort in the state court, and that for *this reason* plaintiff could not collect all over again in the Federal Court.

Conclusion.

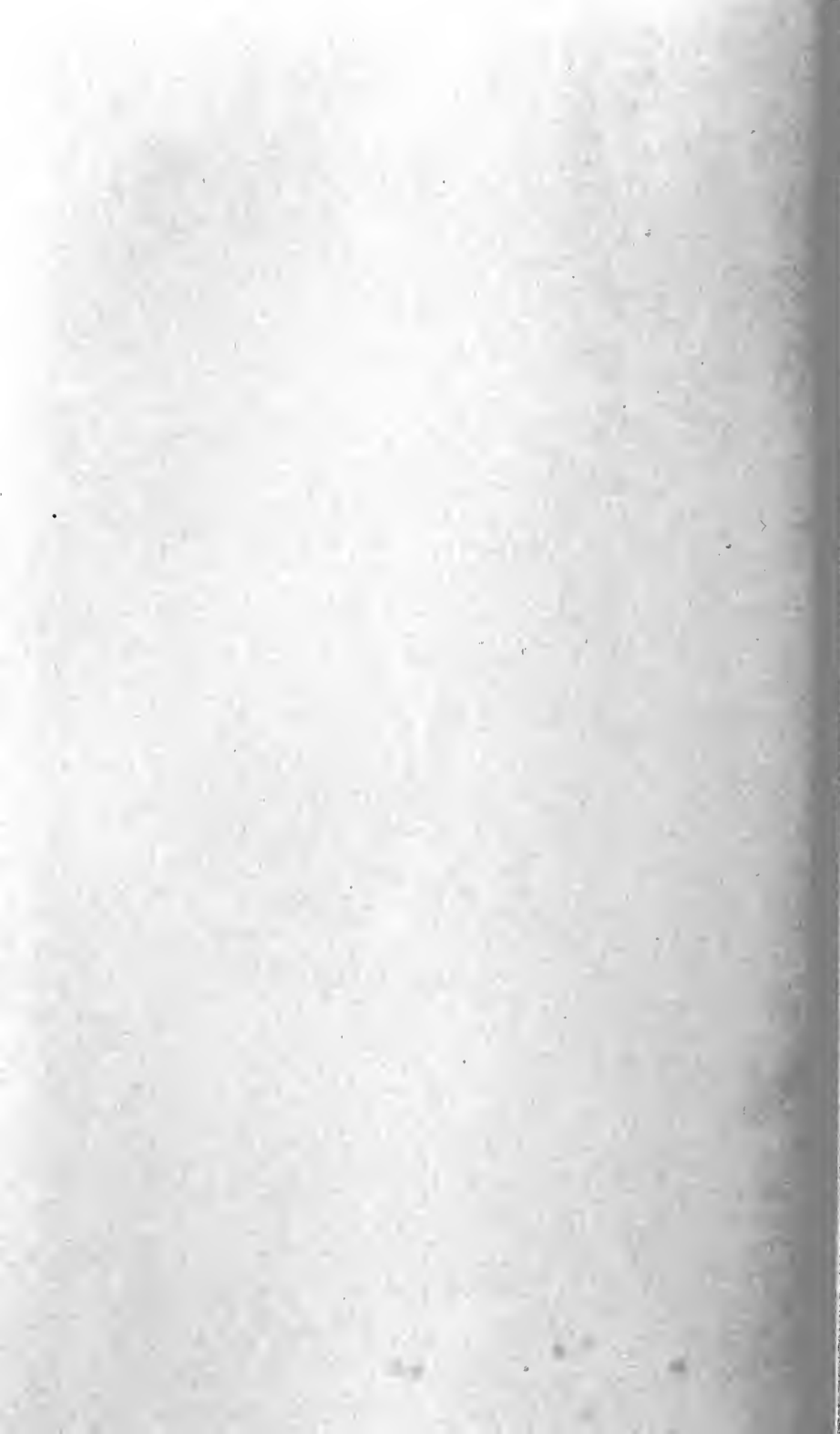
It is respectfully submitted that the judgment of the District Court should be affirmed in all respects.

ALFRED C. ACKERSON,
Attorney for Appellees.



APPENDIX A.

Certified copy of the record in Socony-Vacuum Oil
Company v. United States.



Company. I had no contract. I have been buying from Phillips Petroleum since 1932. I have been selling to more filling stations and purchasers the last two years than I was prior to 1932.

I attempted to obtain a more favorable contract during the years 1935 and 1936. I talked about this with E. M. Kelly, and John Getgood, Phillips' tank car salesmen, two or three different times in 1934, 1935 and 1936. Once was at the signing of that contract in 1935. Getgood is the one who signed that contract.

Q. What was the nature of this discussion that you had with Mr. Getgood on this subject, prior to the signing of that contract in 1935?

Mr. Donovan: Just a minute.

The Court: I think you better ask what the conversation was.

Mr. Donovan: If that be the question, I object to it on the ground that it is hearsay and narration of past events, it is not in furtherance of this conspiracy, and cannot be binding upon anyone excepting those concerned with this immediate contract, and is not to be considered as testimony against these defendants.

The Court: Overruled. Exception allowed.

A. Well, I tried to impress on him that we needed more margin in order to continue in business with the jobber's end of it.

536 He said that was the best contract they had to offer.

He said other things that I do not recall. He said it was the same contract they were giving all their jobbers.

I did not approach any other major oil company with reference to obtaining a contract for the supply of my gasoline during the years 1935 and 1936.

A representative of Shell Petroleum Company named Cooksie concerned with tank car sales called on me in the early summer or spring of 1935, with reference to jobber contracts. I don't know how he happened to come to me at that time. He asked me when my contract expired. He called on me several times during that same general period. Our contract did expire, I think, in June. He said that they wanted distribution in that territory, they had very little, and that if I signed their contract, they would put men into the territory to help me work up a business. He did not show me any form of contract. He offered me a contract. He said their contract was the same as I had; 5½¢ split contract. He referred to it in that way. I did not show him my contract but explained to him what I had.

He said the only thing that he had to offer me was a better grade of gasoline and help to sell it. He told me that Shell gasoline would be better than Phillips.

I have followed the trend of the prices that I have been paying for gasoline to Phillips Petroleum Company in 1935 and 1936. The trend was up in 1935. In 1935, 537 the prices fluctuated quite a bit, there was a fluctuation of a full cent.

To my knowledge, I never bought or dealt in so-called "hot-oil".

I am a member of two jobbers' associations: the Wisconsin Petroleum Association, and the National Oil Marketers.

No cross-examination.

538 WILLIAM LANZER, a witness for the Government, testified as follows:

Direct Examination by Mr. Lewin.

I live in Chicago, Illinois. I went to public school and high school.

I have been with W. H. Barber & Company, a Delaware Corporation, for 13 years, and now am manager of refined oil sales. I held that position in 1935 and 1936. The principal office of W. H. Barber & Company is located in Minneapolis. I am in its other office in Chicago. It compounds lubricating oils and greases, handles and distributes linseed oil, turpentine, resin, and kindred products. It is sales representative of two refineries: In Chicago, Globe Oil & Refining Company of Illinois and Globe Oil & Refining Company of Oklahoma, defendants in this case; in Minneapolis, some Tidewater companies.

Our Chicago division has done a business since 1935 of about 60 million gallons of gasoline a year. Approximately the same quantity is handled each year by the Minneapolis division.

The principal states in which Barber Company does business and distributes gasoline are Illinois, Indiana, Michigan, Wisconsin, Iowa, Minnesota, North and South Dakota, and a little in Ohio. That territory has the name, in the oil business, of the Standard of Indiana territory, with the exception of Ohio. The Standard of Indiana territory has been a trade designation ever since 539 I have been in the oil business, I presume because of the

the money we pay out of our pockets to Barnsdall Refining Corporation also goes down.

The tank car prices as published in the Journal of Commerce affected the price at which our gasoline was sold to the consuming trade. If the price in the Journal for spot market gasoline went up, I would not say the retail price went up exactly at that time, but it eventually went up. And if the price in the Journal should go down, the retail price would come down.

By the Court

As to what regulates the price the consumer pays at the filling station, I would say it depends entirely on the Chicago Journal of Commerce quotations. Thus, the consumer price at the pump has to go up to correspond to this $5\frac{1}{2}\text{¢}$ margin.

Mr. Lewin: Q. Now, have you been satisfied with that contract with the Barnsdall Company that I have offered in evidence?

A. No, sir.

Q. Have you been satisfied with the price arrangements in that contract?

Mr. Donovan: I object whether he is satisfied or not. None of us are ever satisfied.

There is a provision in that contract by which we may terminate it at the end of 5 years. Mr. Reeser has 606 given us privilege of cancelling on different conditions.

The chief thing in our business by which we can determine whether we can make money on gasoline is the margin. By the "margin", I mean the difference between what we pay for our gasoline under the contract and what we can sell it for. I believe there is nothing else that approaches that in importance, and of course, the reasonable overhead.

The retail prices during 1935 and 1936 varied at about $5\frac{1}{2}\text{¢}$ above the tank car price as published in the journals.

I complained to several people in the Barnsdall Refining Corporation, one of whom was Mr. E. B. Reeser. One conversation with him was about 2 years ago, about Christmas time. I have complained at other times.

Q. Now, will you state for the jury the substance of Mr. Reeser's remarks to you on that subject.

Mr. Donovan: I object to that, if the Court please, being hearsay and improper and being an

attempt to have this evidence adduced as against these defendants not made in the course of the alleged conspiracy, being a narration of a past event, and certainly not in furtherance of the conspiracy.

607 Mr. Lewin: Your Honor, one of the allegations of the indictment we are trying here is that these contracts were uniform and that money was exacted from the jobber. This is certainly a conversation of one of the defendants with this witness and certainly admissible against him, at least.

The Court: Objection overruled. He may answer. Exception allowed.

Mr. Donovan: May I ask the Court to instruct the jury that, if admitted, it shall not be considered as evidence against any of these defendants, excepting the person named.

Mr. Lewin: And the company. I am agreeable to that.

The Court: Yes, for the time being.

A year ago last Christmas, in Tulsa, Oklahoma, Mr. Reeser told me in substance, "I know that you can't make money on a 5½¢ margin. However, I can't do anything for you. If better contracts are written, we will be glad to write you a better contract." I don't believe he said better contracts were written by him.

To follow that up and find that there are better contracts written is a pretty hard thing to do. I know in my own mind from conversations with other jobbers there are better contracts, but I can't say that definitely, 608 because I never saw a better contract.

I subscribed to the Chicago Journal of Commerce. I make use of that in my business. The invoices that I have described contain on their face the basic price as of the date of that invoice. I have our office compare that basic price as appears on our invoice when we receive it with the quotations in the Chicago Journal of Commerce to see whether they compare to that average on the B Square, and in the case of the low, to see whether they compare on the low. That check is made from day to day.

We keep a record in our files of those clippings from the Chicago Journal of Commerce, showing price quotations and our invoices, to show that comparison. At your request I made a study of those records to see whether there were any changes in those basic prices as compared in our invoices for 1933, 1934, 1935 and 1936. I have that here.

we were in a situation where the retail price had not risen to a price $5\frac{1}{2}\text{¢}$ above the tank car price. During 1935 we were always on an up-grade market, and would have to assume the difference between $5\frac{1}{2}\text{¢}$ and actual margin. We had such a market during part of 1935, and the dealer market was on the up-grade. Of course we were asking our supplier for more margin; I think everybody did that.

By the Court

Assuming that in my business I lost \$10,000 in one year, under my contract, I assumed half of that and my supplier assumed a half. Under the term of my contract, as to whether I could make up that \$5,000 loss, the top was open, but the spread was never great enough so we would exceed a $5\frac{1}{2}\text{¢}$ margin. Only once, I believe in 1936, for a few days we exceeded the $5\frac{1}{2}\text{¢}$ margin and that was due to a drop in the tank car market, when they did not drop the dealer tank wagon or the consumer tank wagon price in that particular time.

During the life of my contract I suffered some small amounts of loss where I had to bear half of it. There was no time where the market fluctuations under my contract permitted me to recover that loss in 1935 or 1936, that I remember, because of the fact that it was an up-grade market. If it had been a down-grade market, we might have been able to make a little profit.

But there was a provision in our contract which permitted us to make up that loss if the market was higher and there was more spread, but we were operating and purely following the market maker's price. We couldn't over sell the market maker.

I think there was a provision in the first contract on the $5\frac{1}{2}\text{¢}$ that we would adhere to the market maker's price. It was generally understood in the industry that there was a market to follow.

By Mr. Chaffetz

I discussed the question of obtaining a more favorable contract during the years 1935 and 1936 with several representatives of Socony-Vacuum Oil Company. I discussed it with Ray Mering of the Kansas City office. I used to consider he was vice president of the White Eagle. I don't know whether he is now or not. I presume this was when he was assistant to Mr. Marcel. I don't know. White Eagle is a division of Socony-Vacuum Oil Company. I talked to him in 1935 and 1936.

Q. What was the nature of your conversation with him in 1935?

630 Mr. Donovan: I object to that question, your Honor, on the same grounds that I have made an objection to such conversations with any representatives of these companies by these jobbers; more particularly being hearsay and does not relate to any issue involved in this case; that it is not a matter in furtherance of any alleged conspiracy or any act done in furtherance of any conspiracy; and for those reasons cannot be taken as evidence against any of these defendants, excepting the person making the statement.

Mr. Chaffetz: I have no objection to the jury being instructed to regard this statement as being binding only on the person making it and his company, the Socony-Vacuum Oil Company, which is a defendant here.

The Court: That is the only way in which it will be received, only on that basis. Objection overruled. Exception allowed.

The Court: What this witness may say will have no bearing, of course, on any of the defendants, except Socony-Vacuum Oil Company and the man making the statement.

I asked Mr. Mering if it was possible to get an increase in margin. He said they only had the one contract. He couldn't see how they could increase the margins, but that if later on there was an increase in margins, he would be one of the first ones to give us the increase in margin regardless of the length of contract. Mr. Mering told me
631 at that time there wasn't any better contract available. In other words, he meant by that if our contract was dated on November 19, and there was a better contract available, I presume, from his company or any other company, before that contract expired, he would give us another contract.

Mr. Fred Elliot was the man with whom I signed the contract, and he is the man with whom I signed the second contract. At that time he was working out of the St. Paul, which is under the Kansas City office. He was assistant to Mr. Halverson over there, and I presume he would be classified as assistant manager at the St. Paul office. I had a conversation with him.

Mr. Chaffetz: Q. Can you give us the substance of such conversation?

Mr. Donovan: May the record show that the same

objection I made to the other question relating to a conversation with any representative of the company is objected to?

The Court: Objection overruled. Exception allowed.

At the time I was negotiating for this contract, I asked Mr. Elliott for a better contract, and he informed me that that was the standard contract, and the only contract that was being written by the St. Paul office.

632 I never bought or sold any so-called hot oil that I know of.

I am a member of the former Iowa Petroleum Association, and the new Association which is being formed in there, called the Iowa Independent Oilman's Association, and the National Oil Marketers Association.

No cross-examination.

633 OSCAR L. PETERSON, a witness for the Government, testified as follows:

Direct Examination by Mr. Chaffetz.

I reside in Evanston, Illinois. My place of business is Chicago. I am vice-president and financially interested in George C. Peterson Company, a corporation, which has been in the oil jobbing business since 1916, about 22 years. I was one of its organizers.

The nature of my business as an oil jobber generally is buying gasoline, fuel oil and lubricating oils in wholesale lots in tank cars, and redistributing through bulk plants to dealers and consumers. The company has 7 bulk plants located in Chicago and vicinity. Those plants have a total capacity of about 1,500,000 gallons of gasoline.

The annual volume of our sales in 1935 and 1936 in gallons of gasoline, both at wholesale and retail was about 15,000,000 gallons each year. Of our total volume of sales about 50% was resold in tank cars, that is, we performed a brokerage business as well as a jobbing business. About 88% of the gasoline sold in our jobbing business in 1935 and 1936 was regular or housebrand gasoline. We have more than \$1,000,000 capital invested in the oil business.

I think we are the largest independent oil jobbing company in Illinois. We perform a jobbing business practically the same as the other jobbers who have testified here, except on a larger scale.

634

I think Cities Service and Empire were the same, or substantially the same, or are now, at least. It was Empire at that time. I discussed the matter with Mr. E. C. Steffey of Chicago, a wholesale tank car salesman for them in the Chicago district.

Q. And what conversation did you have with him on the subject that we were discussing?

Mr. Donovan: The same objection as before as at Record pp. 241 and 292-293.

The Court: Objection overruled. Same ruling. Exception allowed.

(The following two paragraphs were admitted in evidence, at the suggestion of counsel for the Government, only against Cities Service Oil Company and Empire Oil & Refining Company:)

Mr. Steffey came out to our office to discuss with me a gasoline contract in August or September, 1935, and 638 I said that we had a contract, as he knew, with Socony-Vacuum Oil Company, which would expire later in the year, under which we were unable to make a living, and we were in the market for a few connections, if we could obtain a different proposition. Mr. Steffey said, "Well, our contract is no different from the one you have now; in fact, it is the general contract that is being used in the oil business by most of the suppliers, but we may have something else to offer you, which will be enough of an inducement so that you could better afford to have our contract than the one you have, even though they might be the same." And then I said, "Well, Mr. Steffey, what have you in mind?" And he said, "Well, you do a large fuel oil business, and we are large manufacturers of fuel oil, and perhaps we could supply you to a degree that would make quite a difference in your balance sheet." I said, "Well, that sounds interesting; what have you got to offer?" He said, "Well, that is rather a big proposition, and I will have to communicate with our sales office at Tulsa, to see just what the situation is."

A little later on, perhaps 10 days or 2 weeks, he again came out to see me and said that on account of the marketing set-up of Cities Service Company, which was then the marketing division of the Empire Refineries, that if they provided us with their gasoline to sell in that territory, that there would be duplication of outlets, in 639 other words, we would be selling in the same territory as they were selling, and at the present time they did not think it was a practical thing to do, and therefore

they would be unable to go any further in their negotiations with us. However, we did come to an agreement about a supply of fuel oil.

There were many contracts in existence with jobbers and between many supplying companies, and, while they may have varied in some slight detail, the price provisions would come out the same in the end.

In the last 20 years there has been a great change in the type of contract. Going back as far as 1922, I think every refiner had his own type of contract, and his own idea of how he wanted to make a contract, and that carried on for a good many years.

For many years, there were periods when no publication was used, and no price except the posted price of the market leader in the district.

Then, along about 1929 or 1930 contracts began to appear more or less alike. The wording seemed to be a great deal the same, and the provisions the same; and then the price basis commenced to be based on the trade publications, with a split protection feature based on, generally, the price of Red Crown gasoline in the Standard of Indiana territory.

And then, a little later on, when the Iowa plan was adopted, the price basis was changed from the service station price to the tank wagon price.

During 1935 and 1936, in my experience, I found that the contracts offered by the large major oil companies were generally pretty much alike.

In years gone by, we sometimes had no contract at all; we simply bought our supplies from whom we could get to supply us, and at an open market price. Other times, we had maybe a very simple contract with a refiner; it might last for a short period of time, or it might last over a number of years. There was no time prior to 1930 that we weren't free to buy from practically anyone, because at that time we sold all of our gasoline under our own brand, our own trade mark.

After that time we commenced selling major company brands. Naturally, if a jobber is selling the product of a major company that has an established brand, he sells under that brand. Then, of course, we became more or less restricted to that particular brand which we happen to be selling of the major company. In general, there was a greater latitude in which to buy than there has been of late. That was prior to 1930.

Our company preferred to handle a major company brand of gasoline because the major companies have ad-

(Letter and enclosure referred to are received in evidence as EXHIBIT 629.)

(The witness then explained the price provisions of his contract, Exhibit 628, which explanation is omitted here because such provisions speak for themselves.)

At that particular time, on the 6¢ margin, there was a 4¢ dealer discount. That was based on the 4¢ dealer discount, and whenever that dealer discount was reduced, our spread was reduced accordingly; or, if it was increased, our spread was increased accordingly.

(Witness continued his explanation.)

During the greater part of 1935 the prevailing spread between the retail price and the tank car price, plus freight, plus taxes, was never up to the amount of our basic 65¢ guarantee. By that I mean 6¢ while the 4¢ dealer discount was in operation, and 5½¢ while the 3½¢ dealer discount was in operation. I can't recall exactly when the 3½¢ dealer margin came into operation. I think it was sometime in 1935. After the dealer margin became 3½¢, our guarantee became 5½¢. The actual spread between the tank car price, plus freight, plus taxes, and the prevailing retail price hardly at all exceeded 5½¢ during 1935. There were some times in 1936 when it did, not very long periods of time.

Now, take during 1935, when it wasn't there, we really weren't getting 5½¢ because we were standing half of that excess, and sometimes it amounted to \$8, \$9, \$10 and up to \$30 a car, if I remember right. That condition was very general in 1935. The dealer got 3½¢ out of whatever margin we got. So our split, so far as we were concerned, was below 2¢. Part of the time we only had 1.7¢, part of the time 1.8¢, part of the time 1.9¢. We had to pay all of our expenses out of that margin.

Gasoline supplied under that contract was shipped during 1935 and 1936, some from Barnsdall, Oklahoma; some from Okmulgee, Oklahoma; and some from Wichita, Kansas. It was all shipped in tank cars by rail.

We preferred to do business with a major oil company on account of the national advertising of their products, and better trade acceptance.

I have discussed with representatives of our supplier, during 1935 and 1936, the possibility of a change in the form of our contract.

Q. On what occasions, and with whom?

Mr. Donovan: I object to that upon the same

grounds that I have stated before, may it please the Court: That it is hearsay; that it has no relation to any of the issues in this case; that it cannot be considered as evidence against any of these defendants on the issues presented under this indictment.

Mr. Chaffetz: We again yield to a ruling from the Court that any such testimony is limited in its effect to persons making the statements to the witness and to the company of which he is an authorized agent, and officers of that company who may be defendants here.

The Court: Any testimony of this witness as to those conversations will be so limited, and the jury may understand that.

The Witness: Should I answer?

Mr. Chaffetz: Yes.

The Court: Objection overruled, with that exception. Proceed.

556 In 1935, I made 2 or 3 trips to Oklahoma in regard to it, and again in 1936 to see the Barnsdall Company in regard to the price conditions set up on my contract. On both trips, I talked to Mr. G. F. Racette, who was vice president in charge of marketing.

I told Mr. Racette that it was impossible to continue in business with the present margin on our contract, and wanted to know if anything could be done about it. He said there wasn't anything that could be done, and I asked him what he thought the future of the jobber was in this business. I told him that it was impossible to go ahead on a 2¢ margin and stay in business, and I asked, "Is this going to be just temporary, this low margin for the jobber, or as time goes on, is there going to be a better margin?" And he told me, "Well, I don't see much hope for the jobber." And then I said, "Well, there ought to be some kind of relief on a condition of this kind." He said "Well, the only relief that I can offer is to lease your plant to us." He said, "We would consider leasing your plant, if you would be the agent down there." "Mr. Racette," I said, "That is putting me right back where I was 27 years ago. I wouldn't be interested in that proposition, being a commission agent." That finished the conversation at that particular time with him.

Then I talked, either on that trip or in September, with Mr. E. B. Reeser, the president of Barnsdall Company.

657 Mr. Donovan: Same objection.

Mr. Chaffetz: The Government suggests this evidence be admitted on against Mr. Reeser and the Barnsdall Company.

The Court: Yes. Same ruling. Exception allowed.

I asked Mr. Reeser if something couldn't be done in regard to a longer marginal contract, that it cost us more to do business than what our margin was, and we were losing money down there. He told me, "Well, Harry, it is a sad state of affairs when our good customers are losing money on our products", and I added: "Yes, even on a normal market". And I said, "Why don't you do something about it? You are a big company; why don't you put out a contract we can live on and let live?" And he said, "I can't change that contract one iota," or something to that effect. That was all he said.

I never contacted any other major oil company, but several have contacted me. My contract had a six months' cancellation notice on it, and they all knew it, and from time to time I was contacted by other major oil companies with respect to my signing a jobber contract with them.

Mr. Tom Koneke, tank car sales representative of Mid-Continent Petroleum Company called on me I would say 5 or 6 times during the course of 1935, and maybe 3 or 4 times in the early part of 1936. On most occasions I discussed the matter of a jobber contract with him. I
658 told him I would only be interested in a change if I could get a better contract, and he said, "Well, we have no better contract to offer than what you have, but we believe our merchandise would sell better and has better trade acceptance, and is better advertised." I said, "Well, Barnsdall is well known around here; we have no sales resistance on it, and the only thing I am looking for is a contract that is better than the one I have got. If you have one, I will talk with you", and he said he did not have it. I did not talk with any of the other representatives of that company.

I talked with Mr. Oscar Whateley of Lubrite Division of Socony-Vacuum. He and one other sales representative made 8 or 10 trips to see me, and my conversation with them was practically the same as with Mid-Continent.

Mr. Donovan: Same objection. (See objection stated at R. p. 292-3.)

The Court: Yes. Same ruling. (See ruling at R. p. 293.) Exception allowed.

Mr. Chaffetz: The Government suggests that this evidence be admitted only against Socony-Vacuum Oil Company, Inc.

I said that I was not interested in making any change until I could get a better contract; that the trade acceptance of Barnsdall was very satisfactory, and I was only looking for a better margin. He said they didn't have any to offer, but he believed that with their advertising 659 campaign, we would have more gallonage, and I said, "I am not interested in more gallonage unless there is a profit in it."

I talked with the St. Louis representative of Tidewater Company, but I do not recall his name. He called upon me in 1935 and once or twice in 1936. He was a tank car sales representative.

I discussed the matter with Mr. H. A. or W. A. Perriquet of Continental Oil Company during 1935 and 1936. He was in my office at least 5 times during the course of each year, and I cannot say when it was. It might have been one call in January, maybe another one in March, or April. They were 2 or 3 months apart. He was jobber or tank car salesman. I told him the same thing; that I was not interested in a change from Barnsdall unless I could secure a better contract, and he said "Our contract is the same as theirs, and I have nothing to offer you in that way unless it is a change in the merchandise which might be better."

The Court: I want the jury to understand that the testimony as introduced on this subject as to any company is binding on that company only.

Mr. Chaffetz: Q. Mr. Miller,—

Mr. Donovan: Just a moment.

(Mr. Donovan and Mr. Chaffetz conferred with the Court out of the hearing of the jury.)

660 (The following occurred in the hearing of the jury:)

The Court: Gentlemen of the jury, there seems to be some misunderstanding here. I want to say to you this; I say this to you now; that this witness has testified as to conversations he had with representatives of the Barnsdall and Socony and Continental Oil Companies, and any statement he has made as to conversations with each of those companies' representatives is binding thus far only on that company, and not upon the other defendants in the case.

Mr. Chaffetz: And we understand that the Court has made —

Mr. Donovan: I must object to the statement "is binding." It may be admissible, but it certainly cannot be binding.

Mr. Chaffetz: The defense counsel used the word "binding."

The Court: Can you suggest a better word? The evidence is admissible against these corporations and not as against the other defendants.

Mr. Lawton: I think I may have used the word "binding" the first day. It is a word we use down in Illinois, and it may be unfortunate.

661 The Court: So the jury understands they have made an objection to the admission of that evidence, your consideration of that, I am saying to you now that it is admissible as against the corporations or the officers of those corporations that this witness has had conversations with, and against them only.

Mr. Chaffetz: And the Government understands the Court has made the same ruling with respect to similar testimony from other witnesses.

The Court: Yes, let the jury understand that. Anything I may have said to you is qualified so as to correspond with what I have now said.

I am a member of the Missouri Jobbers' Association, and National Oil Marketers Association. I don't know exactly, but I think there are around 100 or 150 members in the Missouri Association. I have never to my own knowledge bought or sold any hot oil.

No Cross-Examination.

662 JACOB H. MIDDLETON, a witness for the Government, testified as follows:

Direct Examination by Mr. Chaffetz.

I am 44 years old and reside at Bowling Green, Missouri. I was an oil jobber during the years 1935 and 1936, but discontinued that business in September, 1937. During that time I was also in the general insurance business. That is my business now. I am at present presiding judge of the County Court in Pike County, Missouri. That is not a legal position. I am not a lawyer.

678 They told me that the new contract was different from the type of contract that Empire Oil & Refining Company was making with jobbers at that time. They told me that the 50-50 basis contract was mostly in effect, a 5½¢ split contract.

Q. When you say the 50-50 split, do you mean the contract based on the average of the averages of the Chicago Journal of Commerce and Platt's Oilgram, with a provision for a 5½¢ guaranteed margin, subject to that split?

A. Well, we asked to be released from Platt's Oilgram ourselves, or the National Petroleum News, rather; and they did that at our own request.

We do not and never during 1935 and 1936 did operate under the brand name of the Empire Company, or Cities Service Company. We operate under the brand name, Midway Oil Company, Midway brand, our own brand.

The contract you show me, dated Tulsa, Oklahoma, February 14, 1935, between Empire Oil & Refining Company and Midway Oil Company, is the contract to which I have testified. I operated under that contract down until I entered into the new contract with the Empire Company on March 11, 1936.

(Contracts referred to received in evidence, respectively as EXHIBITS 632 and 633.)

679 I had a discussion with E. C. Steffy, division manager at Chicago of Empire Oil Refining Company at the time that the contract in 1936 was made.

Q. Now, will you tell us what discussion you had with him at that time with reference to a jobber contract?

Mr. Chaffetz: The Government has no objection to this evidence being admitted only against Empire Oil & Refining Company.

Mr. Donovan: The same objection, if it please the Court to this discussion as appears at R. p. 241 and 292-293.

The Court: The same ruling. Objection overruled and testimony admissible only against Empire Oil & Refining Company. Exception allowed.

I told Mr. Steffy that we didn't feel that we were getting enough margin, that we couldn't operate on that basis. He said, "I realize it, as well as you do, but can you get any better?" I said, "Not that I know of. I would like to shop around a while." "Well," he said, "I will tell you, while I haven't seen all of them, I have seen a great many of the

the practice of posting normal service station prices throughout the state in which destination is located, then and in that event, paragraph three of paragraph B of the contract will be inoperative and the price to be paid thereafter will be determined by the remaining provisions of this agreement.

The contract of 1936 was modified by a rider on September 16, 1936. The rider became a part of the 1936 contract. It was related to the Iowa Plan for the State of Missouri. It put a clause in the contract so that the guarantee provisions were based on dealer tank wagon price instead of retail price. Instead of our guarantee margin being $5\frac{1}{2}\text{¢}$ below the prevailing retail price it became 2¢ below the dealer tank wagon price, as posted by Standard of Indiana. The relation between that dealer tank wagon price and the previously prevailing normal retail price was $3\frac{1}{2}\text{¢}$, so that the margin of the jobber was not changed in any way providing we received the guaranteed margin of $5\frac{1}{2}\text{¢}$ under the retail price. Of that $5\frac{1}{2}\text{¢}$, if we received it at all, we passed $3\frac{1}{2}\text{¢}$ on to the dealer, leaving ourselves 2¢ .
684 When the Iowa Plan was adopted, we just got the 2¢ under the dealer price. In each case the $5\frac{1}{2}\text{¢}$ and the 2¢ guarantee was subject to the so-called split provision.

When the $5\frac{1}{2}\text{¢}$ split margin contract was in effect, the split provision operated at times. I can't give you the dates. I believe it did during 1935 and 1936. The split provisions as contained in our contract mean that if the price which was determined by the average of the two journals mentioned plus rail freight, plus $5\frac{1}{2}\text{¢}$, was in excess of the posted retail service station price of Standard of Indiana, the invoice price was reduced by half of the excess. Thus we didn't have a guarantee of $5\frac{1}{2}\text{¢}$. Out of the $5\frac{1}{2}\text{¢}$ guarantee, if we had gotten it, $3\frac{1}{2}\text{¢}$ would go to the dealer anyway. So with respect to our own business, our guarantee was really a 2¢ guarantee both before and after the adoption of the Iowa Plan. If the margin was less than 2¢ , the Continental Oil Company reduced our invoice prices by half of that difference.

Our company has preferred to purchase from a major oil company because of better consumer acceptance.

We have discussed with our supplier the subject of a new or different type of jobber contract every time a contract came up and many times between. In 1935 and 1936 we discussed it at frequent intervals with Henry Perriquet who was the jobber salesman for Continental in that territory.

385

Mr. Chaffetz: I asked you what was the discussion you had in 1935 and 1936 with Mr. Perriquee with respect to a jobber contract?

Mr. Donovan: I object to that question, if the Court please, because it is immaterial and incompetent and because it is necessarily calling for hearsay, because it is not pursuant to any allegation of conspiracy set forth in the indictment, because there is not proof of authority or agency of the party making the declaration, and it is not admissible against any defendant, individually or corporate, here, and because it is not within the allegations of the indictment.

Mr. Chaffetz: The Government suggests that this evidence be admitted only against Continental Oil Company.

The Court: Objection overruled, but so the jury may understand, the evidence of this conversation will be admissible only as against the Continental Oil Company. Exception allowed.

I knew what Mr. Perriquee's position was with the Continental Oil Company. I had done business with him over a period of time, and had occasion to confirm that he was in truth an employee of the company.

386 We simply asked if there wasn't some possibility of supplying a contract that would yield the company a better margin, and Perriquee said that of all the contracts he had seen it carried the same price provisions as the rest of them, and as far as his company was concerned, there was nothing better to be had.

Under our contract we were not required to sell the dealer at a certain price but we had to compete with the dealer margin offered by the Standard of Indiana. There was no provision of the contract that required us to sell our gasoline according to that figure. That was just a custom of the trade. We might sell a little gasoline, but certainly wouldn't sell much at a price higher than that posted by Standard of Indiana. Our dealers wouldn't get any business if they tried to sell at a higher price. I never saw it tried.

I talked at various times with J. S. Curtis, a division manager of Continental Oil Company at Kansas City, on the same subject as I talked with Mr. Perriquee. He was division manager and I had done business with him over a period of quite some time.

Q. Can you tell us what were your discussions with him on that subject during 1935 and 1936?

Mr. Donovan: Same objection as appears at Record pages 241 and 292-293.

687 Mr. Chaffetz: The Government makes the same suggestion that this evidence be admitted only against Continental Oil Company.

The Court: Same ruling. It is admissible only as to the Continental Oil Company. Exception allowed.

A. I would be unable to fix any definite time. There has been a number of conversations during the years we have done business with them, over this $5\frac{1}{2}\%$ margin. But I discussed it with Mr. Curtis during the period 1935-36.

I never, to my knowledge, bought or sold any hot oil. I am a member of the Missouri Independent Oil Jobbers Association, and National Oil Marketers Association. The Missouri Oil Jobbers Association has somewhere between 100 and 150 members.

Cross-Examination by Mr. Donovan.

Under the contract I could sell at any price I pleased. We sell at a price which enables us to meet competition. We don't attempt to meet all competition, but any reasonable competition.

If I am a jobber and have a service station, and operate that service station in addition to my jobber business, I get my jobber margin and also my dealer margin. As we have discussed here, that might be $5\frac{1}{2}\%$.

688 Q. Let's suppose that your station is standing at a very desirable corner, and you have an advertised brand, and you are doing a good business, in fact, in that sector you perhaps have the dominant business. Let's say I come along, and I get a good brand, and I get a store nicely painted up and some good tanks on the corner opposite to you. Now, I am a dealer, and I am getting only $3\frac{1}{2}\%$. Suppose that I am green in this business, and I am foolish enough to think I can compete with you, and I, at the same time that you are selling at 20¢, I cut my price to $19\frac{1}{2}\%$. If you began to see the business come to me after a week or so and you began to see your business decline, what would you do?

that out of our pocket. And when we are collecting a 5¢ gas tax on a 17/10¢ or 2¢ gross profit, it is a difficult job. It is one of our expensive items. Of course, added to that has been an increase in wages and an increase in price of equipment, especially new computing pumps that we must have and install. These pumps used to be bought for probably \$100 or \$125, and the best type of pump now is \$225.

Jobbers are often required to buy these. On a 2¢ margin, it requires a long time to pay for them. Then, of course, we have the accounting and bookkeeping demanded by two states, or any state if you are operating only in one state, as to your records and gas tax. In addition to these things, we have the usual expense of a wholesale business such as maintenance of equipment. We have bulk plant, salaries of employees, and insurance.

Our type of business I think is distinct from any other merchant. Another merchant is not responsible after he sells. He is not responsible for this tax, but the jobber is. That, as I understand it, is one of the difficult parts of a jobbing business.

In the early days of the jobbing business there was no tax. We have had a tax about 5 or 6 years. But the taxes have been increased. On a 2¢ gasoline tax our hazard of collection is not so great of course as on a 4¢ tax.

During 1935 and 1936 we had occasion to discuss with a representative of our supplier the subject of a change in the form of our jobber contract. On account of the narrow margin, and our expense increasing, we went to them several times in 1935 for a better contract. I talked principally to L. C. Trapp, assistant sales manager of the Empire Company.

Q. What conversation did you have with him in 1935 and 1936 on that subject, and give us if you can the time and place of such conversation if you can recall it.

Mr. Donovan: I object to that, may it please the Court, as incompetent, and immaterial because necessarily calling for hearsay. It was not made in furtherance of any alleged conspiracy under this indictment, and certainly is not within the issues of the allegations set forth in this indictment, and not evidence against any of these defendants.

Mr. Chaffetz: The Government suggests this evidence be admitted only against Empire Oil & Refining Company.

The Court: Objection overruled, with this qualification; that it is admissible as to the Empire Oil & Refining Company. Exception allowed.

We spoke to Mr. Trapp regarding this contract at the time of the renewal. That would be in September, 1935, and like all jobbers, we complained of the narrow spread, and of course asked for a better contract, but could not secure it. Mr. Trapp did not tell me why he could not give me a better contract, but he did tell me that if there
702 were better contracts obtainable then he would give me the same kind of a contract, that is, as I understood.

During that same period I talked with Fred Wibert of Duluth, Minnesota, who I understood was the jobber salesman of Shell Petroleum, on that same subject. I asked him what kind of a contract the Shell was offering. I thought they were a big organization and might have a better contract. He told me it was the usual $5\frac{1}{2}\%$ split and he could do nothing better; he said, "I can do nothing for you."

The house brand gasoline that we handle for the Empire Company is known as "Koolmotor". If I make a comparison, Red Crown would be the house brand of Standard Oil and Cities Service "Koolmotor" is the house brand, the name of the leading brand of Empire.

We prefer to handle a major company brand of gasoline because of the public or consumer acceptance, and the advertising. I find consumers prefer to buy an advertised brand of gasoline for this reason: that when you are dealing, like most jobbers have to, with re-sellers, they prefer a nationally advertised brand. So it is necessary for us as jobbers oftentimes to carry a major line if we hope to do business with re-sellers, which is the principal part of our business.

703 *By the Court*

The jobber suffers loss through the evaporation of gasoline in two ways: one, through evaporation, and especially in northern Wisconsin and Minnesota, what is known as shrinkage. That is 1% for every 20 degrees in temperature. For instance, if we have a car of gasoline shipped to us, which we often have, at 10 below zero, we would have an equivalent of 3% shrinkage, and on an 8,000 gallon car it would amount to 240 gallons of gas that we never could sell as long as the weather stays 10 below. It gets 40 below in Superior. In hot weather, of course, there is an expansion, but we have to buy this gasoline at 60 and in northern Wisconsin we don't have very many

says much over 60. The mean temperature is 39 for the year. So we do stand a substantial loss in shrinkage.

Cross-Examination by Mr. Donovan.

I started in the oil business in a small way in 1922. Since 1930 I have given pretty much 100% of my attention to this business. Over this period I inquired into the different phases of the business and into its business hazards and difficulties. The hazards that we happen to encounter certainly are the same kind of hazards that the whole industry has to encounter.

The refiners and the producers have to pay taxes, and all have to encounter the same kind of danger up to the point where we buy. After a refiner, independent or major oil company ships a car of gas into a town, when he is relieved at that moment from any gasoline state tax.

Our expenses come out of our total income on all the products that we sell. 70% of the total income is the $\frac{1}{2}\text{¢}$ margin on gasoline. We deduct our expenses from our total income when we make our income tax return.

When we sell to a dealer, we sell under an arrangement or a contract that allows him $3\frac{1}{2}\text{¢}$ margin. When other jobbers have contracts or arrangements with other dealers they allow the same margin, to the best of my knowledge.

Q. So that normally, that margin of $3\frac{1}{2}\text{¢}$ which the jobbers allow the dealers, normally, that margin is uniform throughout the trade, is it not?

A. It is based on the contract.

Q. Whatever it is based on, the margin is the same as allowed by the jobbers to the dealers; is that correct?

A. It is true, but it is right in our contract. It is based on the Standard Oil tank wagon market. $3\frac{1}{2}\text{¢}$ to the dealer, and that is in the contract.

Q. Where is it in your contract that you must allow $3\frac{1}{2}\text{¢}$ to your dealers?

05 A. I said it was based on that. That is why we compute our protection.

Q. You can sell at any price you please.

A. I couldn't sell it over that amount.

Q. Where is it in your contract that provides you are to do that?

A. It is not provided, but it would be bad practice to do it. You can't and be successful.

The Court: Objection overruled. Exception allowed. I will say to the jury that, at this state of the proceedings, it is admissible as to the Mid-Continent Petroleum Corporation only.

I told Mr. Berger I was dissatisfied with the new contract. The earlier contract, under which I had been operating, provided for a $2\frac{1}{2}\text{¢}$ guaranteed margin, and they were cutting me down to 2¢ . According to their invoices, they had cut me down to 2¢ , beginning March, 1934. Of course, I realized that when the first contract was over the $2\frac{1}{2}\text{¢}$ guaranteed margin would not apply to future shipments. I hated to be cut down to 2¢ , so I objected to it. However, Mr. Berger stated that that was the best contract they would give; it was the same kind of a contract as others were giving, and I might just as well sign this contract, because I couldn't get anything better; and if there was a better one offered to me from the larger companies, that their company would no doubt go along with any similar contract.

I knew that I had to negotiate a new contract if I wanted to continue with them. Mr. Berger did make some concessions to me. He omitted the split of guarantee of 2¢ , which provision was stricken from the printed form. I was given a flat 2¢ guarantee. Also, I endorsed a clause to the effect that if their company, any time during the continuance of this contract, presented a better contract, I had the privilege of cancelling this contract, and accepting the better contract.

Cross-Examination by Mr. Donovan.

I am now operating under a $5\frac{1}{2}\text{¢}$ guarantee open top.

Supreme Court of the United States

I, **Harold B. Willey**, Clerk of the Supreme Court of the United States,

do hereby certify that the foregoing photostatic -----

pages, numbered from 1 to 22 -----, inclusive,

contain a true copy of ~~the~~ excerpts from the transcript of record as

printed for the use of this Court ----- in the case of

the United States of America, petitioner, v. Socony-Vacuum Oil Co.,
Inc., et al.

and

~~vs.~~

Socony-Vacuum Oil Co., Inc., et al., petitioners, v. The United
States of America

nos. 346 and 347, October Term, 1939, as the same remains upon the

files and records of said Supreme Court.

In testimony whereof I hereunto subscribe

my name and affix the seal of said

Supreme Court, at the City of Washing-

ton, this Nineteenth ----- day

of March -----, A. D. 1956.

HAROLD B. WILLEY

Clerk of the Supreme Court of the United States.

By

Reginald C. Dille

Deputy



No. 15005.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

THE FLINTKOTE COMPANY, a Corporation,

Appellant,

vs.

ELMER LYSFJORD and WALTER R. WALDRON, Doing
Business as Aabeta Co.,

Appellees.

REPLY BRIEF FOR APPELLANT.

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G. RICHARD DOTY,
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& GREENE,

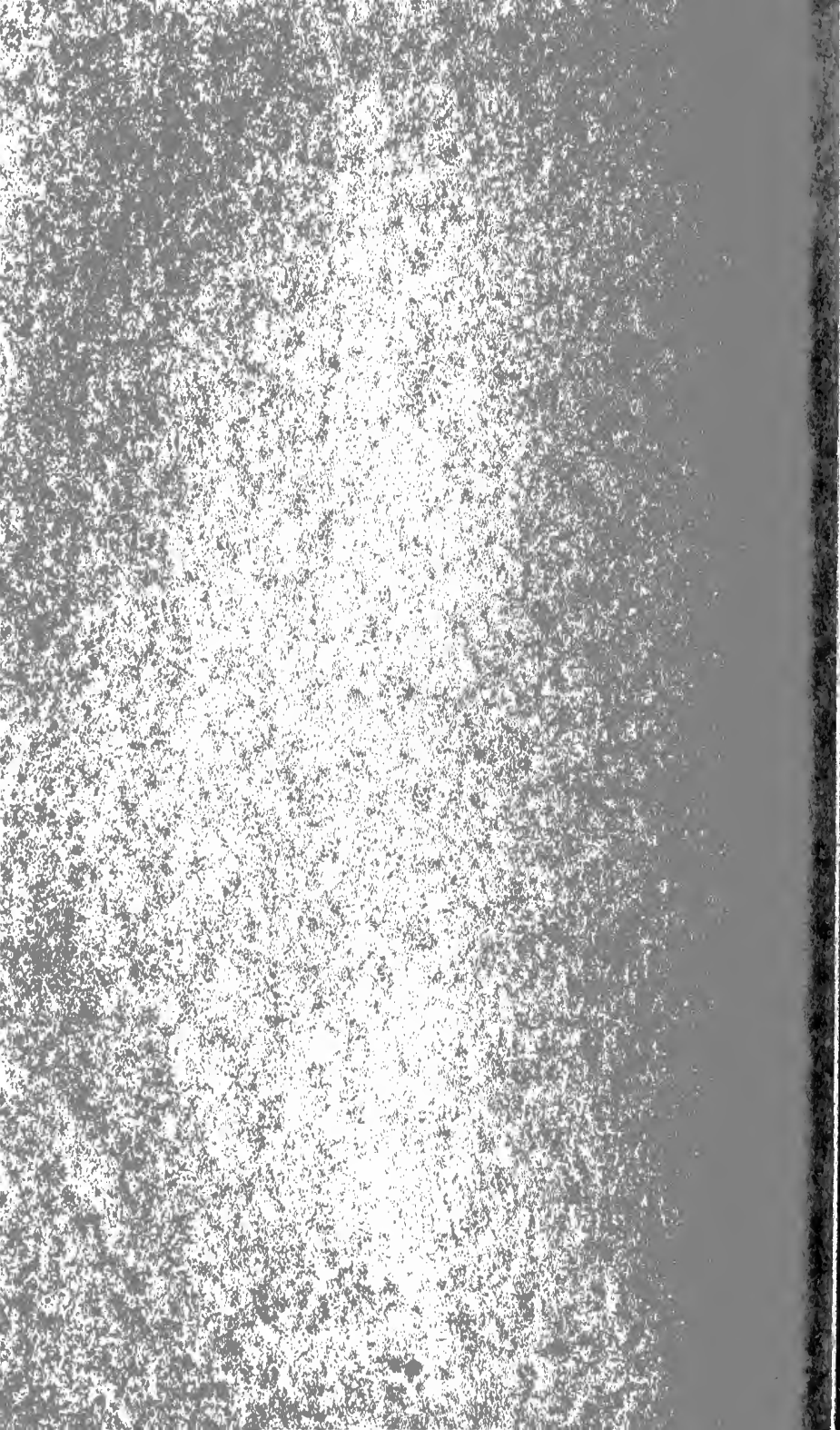
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FILED

AUG 15 1956

PAUL P. O'BRIEN, CLERK



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No. 15005.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

THE FLINTKOTE COMPANY, a Corporation,

Appellant,

vs.

ELMER LYSFJORD and WALTER R. WALDRON, Doing
Business as Aabeta Co.,

Appellees.

REPLY BRIEF FOR APPELLANT.

I.

Plaintiffs' "Statement of the Case" Is Distorted and
Misleading.

Flintkote contends that its statement of the case in its opening brief was entirely accurate and was complete enough for the proper consideration of all matters involved in this appeal. It was prepared in strict compliance with paragraph (c) of Rule 18 of this Court. Plaintiffs have noted no particular in which Flintkote's statement of the case was erroneous, but, in lieu thereof, they have attempted to substitute an inaccurate, erroneous, unfair and inflammatory statement of what they wish the case had been. Plaintiffs' statement of the case embraces substantially 30 pages of their brief. Very few of the statements contained therein are unobjectionable.

Frankly, we had had some difficulty in determining what to do about this situation. We certainly could not be expected to put up with this sort of thing in silence. Nor could we expect this Court to accept our characterization of plaintiffs' statement of the case without documenting what we say about it. Yet to point out specifically each erroneous or misleading statement and to specify wherein it was faulty would require more space than plaintiffs' statement itself. We have decided to select, and print in an appendix to this brief, a number of examples (by no means a complete list) which should suffice to show the cavalier manner in which facts were ignored in plaintiffs' statement.

II.

The Evidence Does Not Support the Verdict. Plaintiffs Have Failed to Show Any Evidence That Flintkote Knowingly Participated in an Unlawful Conspiracy.

The basic question to be determined in connection with our first specification of error is whether there is any evidence in the record justifying a conclusion that Flintkote was a knowing participant in an unlawful conspiracy.

Plaintiffs have pointed to no evidence rebutting the direct testimony that Flintkote neither participated in nor knew anything about any conspiracy among certain contractors to fix prices and allocate jobs. Plaintiffs do not contend that this testimony has been shaken.

They say (Appellees' Brief, p. 31):

“Concisely stated, the question now before this Court is whether there was any evidence in the record supporting the jury's conclusion that Flintkote knowingly agreed with appellees' competitors to destroy or restrain appellees' ability to compete in the in-

dustry for the stated purpose of aiding the contractors' monopoly."

They then proceed to assume, or even worse, characterize as "admitted" the very points which they say are at issue before this Court (either ignoring or misstating the evidence on this subject) and assert, for example:

" . . . after agreeing with its co-defendants to eliminate appellees' competition" (*id.*, p. 32).

" . . . after Flintkote agreed to and did in fact destroy appellees' competition" (*id.*, p. 33).

"The evidence stands uncontroverted that the sole and only purpose of these latter admitted meetings was to discuss appellees' competitors' demands that Flintkote agree to destroy appellees' ability to compete."

" . . . its conspiratorial act in agreeing with appellees' competitors to put appellees out of business." (*id.*, p. 34.)

"The common purpose here was admittedly to put appellees out of business" (*id.*, p. 37).

"Appellant through its own witnesses affirmatively introduced evidence of numerous meetings between Flintkote officials and appellees' competitors for the sole purpose of discussing these competitors desire to have Flintkote aid them in destroying appellees competition." (*id.*, p. 39.)

Let us briefly refer to the record on these matters:

(1) When plaintiffs started dealing in the Los Angeles area there were *individual* complaints by the Flintkote contractors. The chief complaint was that Flintkote had set up a new account in the Los Angeles area without notifying them. (Ragland, R. 805; Baymiller, R. 984; Hoppe, R. 1011; Lewis, R. 1047; Krause, R. 1127, 1142.)

(2) There was no general demand by the Flintkote contractors that plaintiffs be cut off. There was no flat and unequivocal demand by any of the Flintkote contractors that Flintkote terminate relations with the plaintiffs. Mr. Krause at first became angry that a new account had been established without notification and "requested that action be taken to correct the situation". (Lewis, R. 1047.) But he was told quite emphatically that Flintkote would do what it thought best (Krause, R. 1125) and, after he had cooled off, he accepted the proposition that Flintkote had the right to do what it pleased (Krause, R. 1142). Apart from the hearsay testimony as to the alleged Ragland declarations, which we submit was improperly admitted and should be disregarded—there is no evidence of any other demand by a Flintkote contractor that the plaintiffs be cut off. Mr. Baymiller's testimony is that no one of the Flintkote customers suggested by act, word or deed that Flintkote terminate the plaintiffs' account if Flintkote found they were doing business in the Los Angeles area (Baymiller, R. 989).

(3) At all of these interviews Flintkote representatives uniformly and immediately stated that plaintiffs were not supposed to be operating in the Los Angeles area (Krause, R. 1127; Howard, R. 1151; Baymiller, R. 984).

(4) There was no promise or agreement made to cut off the plaintiffs. The Flintkote representatives unequivocally stated that they would take such action, if any, as Flintkote in its own discretion deemed best (Harkins, R. 1066; Krause, R. 1125, 1126, 1128; Howard, R. 1152; Lewis, R. 1047; Baymiller, R. 951, 984).

(5) There is no evidence of any combination, agreement or conspiracy among the dealers or even among the Flintkote dealers to force or induce Flintkote to cut off plaintiffs. Even if it be argued, which we deny, that

the existence of such a combination could be inferred, there is no evidence that Flintkote knowingly joined it.

(6) There is no evidence whatever that Flinkote had any discussions or contacts with the contractors who did not handle Flintkote products.

Plaintiffs' brief does not in any respect meet, answer or in any way tend to weaken the points made at pages 46 to 60 of Flintkote's opening brief. Instead, they apparently hope that by assuming the facts in issue and attempting to shift the argument to immaterial points which are favorable to them or undisputed, while ignoring the central issues, they will obscure the true nature of the case from the Court. The distortion and misstatement characteristic of plaintiffs' "Statement of the Case" is continued and developed throughout this section of their argument. As was the situation with respect to plaintiffs' "Statement of the Case," it would be impossible within reasonable limits to discuss every erroneous or misleading statement appearing in the brief, but we feel compelled to point out some of the more flagrant inaccuracies and misrepresentations.

At page 31 plaintiffs state that Flintkote's argument is based on the three "untenable propositions" therein set forth. Paragraph 1 asserts that we wish this court to examine certain isolated portions of the evidence to the exclusion of all other evidence. That is patently false. Flintkote's position in regard to its motion to set aside the verdict is that there is no substantial evidence in the record that Flintkote knowingly participated in an unlawful conspiracy. Flintkote asks that the court consider the *entire* evidence in the case; it has diligently searched the record and has attempted to find all the evidence which might conceivably be thought to show such knowing participation by Flintkote; it has analyzed that evidence to show that it is insufficient to establish the knowing

participation which is prerequisite to a verdict for plaintiffs. Plaintiffs have not pointed to any additional evidence relevant on this point, and it is submitted that there is none.

Paragraph numbered 2 on page 31 of appellees' brief, it is submitted, does not state any "proposition" at all. Further, the court's instructions and the jury's verdict are utterly immaterial to the question whether there is evidence to support the verdict. (Flintkote also excepts to the reference to "Flintkote's agreement with appellees' competitors to destroy their business" because (1) the issue here is whether there is evidence that Flintkote knowingly participated in a conspiracy, (2) there is no suggestion that the "destruction" of appellees' business was ever mentioned by anyone, (3) appellees' business was not destroyed.)

Paragraph numbered 3 on page 31 of appellees' brief (1) assumes evidence to show an agreement with "appellees' competitors" (which is one of the issues to be argued), (2) assumes evidence of "destruction" (which plaintiffs' own evidence conclusively proves did not occur), (3) states "knowledge" as a fact (although whether there was evidence thereof is part of the issue), and (4) refers to "inevitable effect" (which was never shown) and "unlawful character" (which is a principal issue).

In the last paragraph on page 31, plaintiffs refer to "the contractors' monopoly." The evidence will not support the characterization. There was no attempt to show the relevant market, the number of persons engaged therein, the volume of business done, the volume of business controlled by the so-called "defendant contractors," the extent of the success of any conspiracy to monopolize which might have existed (the proof, it will be recalled, went solely to a conspiracy to fix prices and allocate jobs and had nothing to do with monopoly), the extent to

which effective competition in the undemonstrated relevant market was prevented or hindered, or any other matter necessary to proof of monopoly. For a general analysis of proof of the relevant market and the control thereof necessary to a showing of monopoly, see,

United States v. E. I. du Pont de Nemours and Company, 76 S. Ct. 994, 1004-16 (1956).

The reference in the last two lines on page 31 to "the entire conspiracy and monopoly existing in the industry as a whole" is similarly wholly unwarranted by any evidence.

Plaintiffs, at the top of page 32 of their brief (and at pp. 73 and 85), state that a combination or conspiracy to eliminate the competition of plaintiffs would be a "*per se* violation of the Sherman Act." That is not a correct statement of the law, and the cases cited on page 73 do not support it. The *Darnell*, *International Salt*, and *National City Lines* cases were all monopoly cases, and, as has been demonstrated, there was no proper proof of monopoly in this case, and further, plaintiffs' statement is not based on monopoly, but is at least ostensibly referring to a conspiracy under Section 1 of the Sherman Act. The *Socony-Vacuum* case cited by plaintiffs does not support the proposition asserted by plaintiffs and, in any event, was reversed by the Supreme Court (*United States v. Socony-Vacuum Oil Co.*, 310 U. S. 150, 60 S. Ct. 811 (1940)). The *Village Theatre* case, cited by plaintiffs, conclusively establishes that the law is otherwise than plaintiffs claim it to be. That case involved an alleged conspiracy to exclude plaintiffs from bidding for first run Paramount pictures. At page 726 of 228 F. 2d, the court said:

"The mere agreement among Paramount Film, United and Intermountain that films were to be distributed to Intermountain and other downtown

theatres on a competitive bidding basis, to the exclusion of the Villa Theatre, *was not in itself per se unlawful. It presented an issue of fact as to whether there was an unreasonable restraint of trade and that issue should have been submitted to the jury*, as requested by tendered instruction of the defendants.” (Emphasis added.)

The second sentence in the first full paragraph on page 32 says that Flintkote “must also admit there was evidence showing” a whole series of things. Flintkote makes no such admission and submits that there is no evidence showing any of the things there listed, whether at the cited pages or elsewhere in the Record. As previously noted, there was no showing of a monopoly by the contractors named as defendants. There was some inconclusive testimony (R. 272) that the prices charged by the various manufacturers were “parallel and equal” to Flintkote prices, but that hardly establishes a “total lack of price competition.” Plaintiffs refer to elimination of competition through policies “whereby a single defendant contractor constituted the sole outlet for two otherwise competing lines of tile,” but plaintiffs’ own chart, on page 8 of their brief, shows that statement to be false. Probably the most serious misrepresentation in this section of the brief is the statement that “the *admitted* purpose of terminating appellees’ only available source of supply was, in addition to the destruction of appellees’ competition, to perpetuate and preserve this non-competitive picture in the industry” (p. 32). Flintkote never made any such admission or admitted that any part of that statement bears any resemblance to the truth. Nothing in the evidence in any way tends to support that bald misstatement. Needless to say, the assertion finds no support in the pages of the Record cited immediately following it. Flintkote admits that plaintiffs were suffi-

ciently qualified to be approved as Flintkote contractors in the San Bernardino-Riverside area. It did not admit that they were sufficiently qualified to be approved as Flintkote contractors in Los Angeles. In Harkins' words, "The discussion with them was whether they wanted to go into business in San Bernardino or not." (R. 1079.) There is no indication anywhere in the Record that plaintiffs were at all qualified to run an acoustical business, although there is abundant testimony that they were thoroughly experienced salesmen and applicators.

The first sentence in the last paragraph on page 32 is inaccurate in that it refers to Flintkote "officials" and "appellees' competitors," whereas the meetings were between Flintkote employees who were not officers and Flintkote contractors. The second sentence of that paragraph is inaccurate in that there is no direct evidence that Flintkote agreed to do anything, much less to "eliminate appellees' competition"; as previously noted, the suggestion that Acoustics, Inc., was "inexperienced" is not warranted by the evidence.

The first sentence in the first paragraph on page 33 is wholly false: the exhibit shows nothing with respect to whether or not Flintkote agreed with anyone to do anything; it merely shows that its sales were greater in 1952 than they were in 1951. The second sentence is false in that it misstates Flintkote's defense which certainly had nothing to do with "where Flintkote's co-conspirator contractors operated."

What has been said should be enough thoroughly to discredit the professedly factual statements appearing at pages 31 through 34 of plaintiffs' brief. The failure to discuss specifically the statements in the last half of page 33 and on page 34 does not constitute an endorsement thereof, and it is submitted that, for the most part, they too are inaccurate in varying degrees.

The authorities cited and discussed in this section of plaintiffs' brief do not militate against the position taken by Flintkote; they are entirely consistent therewith. Flintkote agrees that circumstantial evidence, without any direct evidence, may provide sufficient support for a verdict in a proper case, but it contends that the circumstantial evidence adduced here was insufficient to do so in this case. Flintkote agrees that if it participated in a conspiracy at all it is liable for all acts done by all co-conspirators in furtherance of the conspiracy, whether before or after its joinder therein, but its position is that the evidence is insufficient to show any participation by Flintkote in any conspiracy at any time or at all. It agrees that knowing participation in an unlawful conspiracy "is sufficient to hold a co-conspirator"; its position is that the evidence is not sufficient to support a finding of such knowing participation. Flintkote takes no issue with the *Paramount* case, but denies that it is applicable to the facts here.

As stated at the top of page 49 of Flintkote's opening brief, "The issue, then, is whether the evidence will support a finding of 'knowing participation' in an unlawful conspiracy." On the pages following Flintkote analyzed the evidence to demonstrate that the evidence would not support findings either of "knowledge" of a conspiracy or of "participation" therein by Flintkote, much less a finding of "knowing participation." Plaintiffs have not offered any shred of evidence which was not adequately discussed and completely disposed of in Flintkote's opening brief. It therefore seems pointless to repeat that argument here, and Flintkote will not do so.

At pages 36 and 37, plaintiffs refer to the *Las Vegas Merchant Plumbers* case and attempt to place Flintkote in Alsup's position. Alsup's position was wholly dissimilar to that of Flintkote in that there was substantial evidence

that Alsup was an active participant in the conspiracy and one of the organizers thereof. Plaintiffs have quoted a minor and misleading portion of this Court's discussion of the evidence against Alsup. This Court's full summary of the evidence against Alsup was as follows (at p. 750 of 210 F. 2d):

"Alsup raises the contention that the evidence was not sufficient to support his conviction, but the record shows his active participation in the conspiracy from its inception in mid-August of 1950. He was present and participated in the first meeting between the plumbing contractors, when the organization and the setting up of an estimator was discussed. Bates, a plumbing contractor present at the meeting testified that he said to Alsup that he 'did not see how the deal could be made to work.' Alsup replied that he thought 'we will have something that will work this time.' He said he was in a position where if the people did not go along with him he was in a position to get them to comply. The evidence shows further that Alsup forbid journeymen plumbers, employees of Ritter, a contractor, to work for Ritter until he promised to withdraw a bid which he had given out of line with the purpose of the conspiracy. In addition, Sylvester, an outside plumbing contractor who was awarded a plumbing contract on the Las Vegas race track went to Alsup's office to obtain men. Two of the plumbing contractors, appellants herein, attempted to get him to back out of the deal. In Sylvester's presence they asked Alsup to protect them. Alsup readily furnished plumbers to Sylvester on another project for the Atomic Energy Commission at the same time he refused to furnish plumbers to work at the race track. The jury could rightfully infer, and so did, that Alsup's actions were in answer

to the pleas of the plumbing contractors that they be protected.”

Obviously the evidence against Flintkote is not even remotely equivalent to that against Alsup, and there is no analogy between that case and this.

Flintkote particularly excepts to the statement in the middle of page 37 of plaintiffs’ brief that “The common purpose here was admittedly to put appellees out of business and thus maintain the monopoly of their competitors.” There is absolutely no evidence in the record of any such admission by anyone, and, on the contrary, the record is uniformly to the effect that every witness, except plaintiffs, denied that there was any common purpose, agreement, or design whatsoever. Further there is no proof of monopoly in anyone.

The argument appearing at pages 38 through 40 of plaintiffs’ brief consists merely of a statement of plaintiffs’ conclusion that the evidence is sufficient to support the verdict. No attempt is made to demonstrate by reference to the record that any facts existed which were not discussed in Flintkote’s brief and demonstrated to be insufficient.

The *Paramount Pictures* case is immaterial in this connection. Flintkote’s position is that the evidence is insufficient to show knowing participation in a conspiracy. Whether coerced participation is any different from voluntary participation is not involved, since Flintkote’s contention is that the evidence does not show knowing participation in any form, voluntary or coerced, or at all.

The final statement in this portion of plaintiffs’ brief (p. 45) that the jury’s verdict provides “The conclusive answer here” is simply ridiculous. In the first place, the issue is whether the evidence will support the verdict, and the fact that the jury returned the verdict is of no

value in the resolution of that issue. In the second place, the jury's verdict was not as stated in that paragraph; no special findings were made; the court's instructions were such that the jury could have returned its verdict without making any such finding (see specification of error number 5 and pages 76-82, Flintkote's opening brief); there is nothing anywhere in the Record to indicate what, if anything, the jury found, except that it was in favor of plaintiffs and against Flintkote and that the damages were \$50,000.00.

In summary, then, plaintiffs have not, in their brief, taken issue with, met, or weakened any of the arguments or authorities raised and presented by Flintkote in support of the proposition that the evidence was insufficient to support the verdict, that the trial court erred in failing to set aside the verdict and enter judgment for Flintkote, and that this Court should reverse the judgment and issue its mandate that judgment be entered for Flintkote.

III.

The Trial Court's Prejudicial Errors With Respect to Admission of Evidence Were Not Waived. Plaintiffs Have Failed to Show That the Evidence Was Admissible.

In our opening brief we complained of two major errors with respect to the admission of evidence:

(1) Evidence with respect to the activities of certain contractors in connection with job allocation and bidding on public projects which was received without proof of any connection with Flintkote (Specification of Error No. 2, Op. Br. p. 11).

(2) Admission of hearsay testimony with respect to alleged declarations of the witness Ragland (Specifications of Error Nos. 3 and 4, Op. Br. pp. 11-13 and 13-20).

Plaintiffs' brief attempts to deal with both of these matters in the same section, but as they involve somewhat different situations, they should be treated separately. As plaintiffs have devoted most of their time to the Ragland declarations, we shall reply on that subject first.

A. The Alleged Ragland Declarations Were Clearly Inadmissible.

At the outset plaintiffs say that the trial court's ruling on this evidence "would not seem to be reviewable by this Court in the absence of a clear showing of an abuse of discretion to the prejudice of appellant" (Appellees' Br. p. 49). It is hard to know what this means. Plaintiffs seem to be saying that the trial court can follow the rules of evidence, or disregard them, at its pleasure. Certainly it cannot seriously be contended that the trial court has any discretion to receive inadmissible evidence; and no principle could be more thoroughly settled than the rule that where clear error is shown, which has a potential connection with the verdict, prejudice is presumed, and the party responsible for the introduction of the improper evidence must, in order to prevent a reversal, demonstrate that the error was not in fact prejudicial.

5 C. J. S., Appeal and Error, §1677, p. 812.

This question was fully considered by this Court in

Lynch v. Oregon Lumber Co., 108 F. 2d 283, 285-286 (9th Cir., 1939),

and the conclusion was reached that "if error is shown, then there should be reversal 'unless it *affirmatively* appears from the whole record that it was not prejudicial' " (p. 286).

Plaintiffs have cited no authority in their brief overcoming or even casting doubt on the proposition that this testimony with respect to Ragland's alleged admissions

was pure hearsay and inadmissible. We shall not repeat the argument set out on pages 66 to 76 of our opening brief. The inadmissibility of this testimony depends primarily upon the elementary principle of the law of agency that the declarations and admissions of subordinate corporate agents are binding upon a corporation only when made in connection with the particular business entrusted to them and only when made in the course of a transaction then being executed for the principal. Mr. Ragland had no authority, express or implied, to bind Flintkote by these admissions, assuming they were made. Of all of the Flintkote people connected with the matters at issue, Mr. Ragland was at the bottom of the ladder. There is no showing that he had authority to make a decision on anything. Specifically, the evidence shows that he was junior to Mr. Baymiller, who was assistant to Mr. Thompson, who in turn was subordinate to Mr. Harkins. Plaintiffs cannot increase Mr. Ragland's authority by inventing and conferring upon him the title of "Chief Promotional Man," either in capitals or in small letters.

Certainly plaintiffs can get no comfort from

Pan-American Petroleum Co. v. United States, 9 F. 2d 761 (9th Cir., 1926).

In that case, Doheny, as president of the two defendant corporations, was the man in complete charge of the transactions called into question in the case, and testified on behalf of these companies at a Senate Committee hearing. The court quite properly held that what he said at that hearing was binding on the two corporations which he dominated. Similarly, in

Vitagraph, Inc. v. Perelman, 95 F. 2d 142 (3d Cir., 1936),

the declarations of the president of certain corporations which were made at the meeting where he was authorized to speak in their behalf were held admissible. These

cases do not even remotely support the contention that a mere salesman, not at the time engaged in any transaction authorized by his employer, could make narrative admissions binding on his corporate principal with respect to past events.

Nor are the cases regarding declarations of co-conspirators of any help to plaintiffs. Their cause in this connection is not advanced by the unsupported assertion that

“the evidence clearly shows that Ragland and other Flintkote officials [*sic*] were in fact unnamed co-conspirators in the case” (Appellees’ Br. p. 51).

Ragland, as a Flintkote employee, was not and could not be a co-conspirator with Flintkote. There is no showing that he did anything in his individual capacity, or that he could be called a co-conspirator with the contractors. Apart from all this, his alleged declarations could not be admitted against Flintkote without independent proof of Flintkote’s participation in the contractors’ conspiracy.

In any event, the act of reciting to the alleged victims of a conspiracy a mere narrative account of past transactions of alleged conspirators could not be called an overt act in furtherance of the conspiracy. See the cases cited at the bottom of page 72 of our opening brief. The dictum in

International Indemnity Co. v. Lehman, 28 F. 2d 1 (7th Cir., 1928),

is against the weight of authority, and as the concurring opinion in that case points out, the court’s ruling is not supported by the authorities cited (28 F. 2d at 4).

Nor, as we have shown in our opening brief, can this testimony be accepted on the theory that it was part of the *res gestae*. In one of the very cases cited by plaintiffs, *Flannagan v. Provident Life & Accident Ins. Co.*, 22 F. 2d 136 (4th Cir., 1927), the court at page 139 cites with

approval the statement in *Boston, etc., Ry Co. v. O'Reilly*, 158 U. S. 334, 15 S. Ct. 830, 39 L. Ed. 1006, "The mere narration of a past occurrence is not a part of the res gestae of that occurrence."

We, of course, agree that the subject-matter of the alleged Ragland admissions is relevant to the issues here involved. That is not what we are complaining about. If the testimony were completely irrelevant, it would not be so prejudicial. The fact that the subject-matter is relevant does not make hearsay testimony proper.

B. The Error in Admitting This Testimony Was Not Waived.

The record shows that timely objection was made, both to the testimony of plaintiff Waldron and that of plaintiff Lysfjord; that the matter was extensively argued; that the objections were overruled; that a motion to strike all of the testimony was specifically made at the time of the close of plaintiffs' case; and that the motion was denied. (See Specifications of Error Nos. 3 and 4, Op. Br. pp. 11-20.) As the Lysfjord testimony was the more vicious, Flintkote made an additional motion to strike that testimony at the conclusion of all of the evidence, and this motion was also denied (R. 1215). Plaintiffs cite cases for the well-established principle that error in ruling on a motion for a directed verdict at the close of plaintiff's case is waived if, after the motion is denied, the defendant introduces evidence. We have no quarrel with this rule, but it has nothing whatever to do with Flintkote's right to rely on errors of the trial court in admitting evidence. It is thoroughly settled that a single objection to evidence clearly made and definitely overruled is sufficient to preserve the error for all purposes and that the objection need not be repeated. See

I Wigmore on Evidence 331 (3d Ed., 1940);

Salt Lake City v. Smith, 104 Fed. 457, 470 (8th Cir., 1900).

Flintkote did not waive its objections by introducing testimony by Ragland denying the making of the declarations and by the alleged participants in the alleged meeting to the effect that the events described in the alleged declarations did not in fact occur. It is of course true that where a certain *fact* is attempted to be proved by inadmissible evidence and the court improperly admits the testimony, the error is cured if the opponent proves the same *fact* by his own testimony. There is, however, a clear distinction between this situation and that where a party, after improper evidence is admitted over objection, offers testimony *denying* the matters attempted to be proved by the inadmissible evidence. In this latter case, the overwhelming weight of authority is that the party does not thereby waive the objection. The rule is succinctly stated in

89 C. J. S., Trial, §661, p. 507:

"Introduction of evidence in rebuttal. A party does not ordinarily waive his objection to the erroneous admission of evidence by subsequently introducing evidence to disprove the matters testified to, to explain them or to prove facts inconsistent therewith, even though it is of the same kind or nature."

64 C. J., Trial, §1175, page 1292, lists a large number of cases in support of a similar statement. Wigmore recognizes that a party does not waive objections to improper evidence by offering similar evidence merely in self-defense to explain or rebut the original evidence.

Wigmore, *op. cit.* §18, p. 345.

A leading case on the subject is

Salt Lake City v. Smith, 104 Fed. 457 (8th Cir., 1900).

In this case testimony given at a former trial was read into evidence over the objection of the defendant,

and the defendant thereafter rebutted this evidence in part by the testimony of other witnesses at the former trial. In answer to the contention that the objection to the inadmissible evidence was thereby waived, the court said (p. 470):

“Nor did they waive this objection and exception by introducing in defense of the suit evidence of the same character as that to which they had objected, and which they had insisted was incompetent. They had presented their view of this question. They had objected to hearsay testimony, and had excepted to the ruling which admitted it. They had not invited the error of that ruling, but had protested against it. This was all that they could do. The plaintiffs had induced the court to commit the error, and were thereby prohibited from availing themselves of it in any court of review. Under this error they established their case by hearsay. Were counsel for the city required to refrain from meeting this proof by evidence of like character, under a penalty of a loss of their objection and exception? By no means. They had presented to the court and argued what they deemed to be the law. The court had held that they were mistaken. However firm they were in their conviction of the soundness of their position, the presumption was that they were in error; and it was the part of prudence and their duty to their client and the court to produce all the evidence which they could furnish in support of their demands, under the rule which the court announced, firmly but respectfully preserving their right to reverse the judgment if they failed to win their suit under the erroneous rule which the court had established. If they succeeded and obtained a verdict, the plaintiffs could not complain of the error which they had themselves invited, and the defendant’s case would be won. If

they failed, they would in this way preserve, as they had a right to do, the right of their client to the trial of its case according to the statute and the established rules of evidence, of which the erroneous ruling had deprived them. One who objects and excepts to an erroneous ruling which permits his opponent to present improper evidence does not waive or lose his objection or exception, or his right to a new trial on account of it, by his subsequent introduction of the same class of evidence in support of his case. *Russ v. Railway Co.*, 112 Mo. 45, 50, 20 S. W. 472, 18 L. R. A. 823; *Gardner v. Railway Co.*, 135 Mo. 90, 98, 36 S. W. 214.”

The above case was cited with approval in

United States v Konovsky, 202 F. 2d 721, 727
(7th Cir., 1953),

as follows:

“It is said that the defendants waived their objection in this respect. We do not understand that the mere fact that defendants attempted to meet the erroneous evidence constituted waiver upon their part. [Citing and quoting from *Salt Lake City v. Smith*, *supra*.] . . . See also *Chicago City R. Co. v. Uhter*, 212 Ill. 174, 180, 72 N. E. 195, 197; *State v. Beckner*, 194 Mo. 281, 91 S. W. 892, 896, 3 L. R. A., N. S., 535; and *State v. Kile*, 29 N. M. 55, 218 P. 347, 351.”

The three cases cited in the above quotation all fully discuss and explain the rule.

The rule is the same in California. In

Short v. Frink, 151 Cal. 83, 90 Pac. 200 (1907),

the court admitted, over objection, irrelevant testimony concerning an alleged admission by the defendant. The defendant later took the stand and denied that he had

made any such admission, and it was argued that the objection to the inadmissible testimony was thereby waived. In response to this contention, the California Supreme Court said at page 87 of 151 Cal. and page 202 of 90 Pac.:

“Nor can we hold that the error was cured by the testimony subsequently given by defendant upon this matter, under the rule declared in *Treat v. Reilly*, 35 Cal. 129, that a party cannot be held to be injured by the admission or refusal to strike out objectionable testimony, if the same party afterwards introduces the same testimony. (See, also, *People v. Marseiler*, 70 Cal. 98 [11 Pac. 503].) In addition to the fact that what was said by plaintiff on this subject was said by him purely in self-defense, solely to meet and explain the objectionable evidence as far as possible, and cannot well be held to have been voluntary (see I Wigmore on Evidence, sec. 18d, note), the testimony of defendant in relation to the interview between himself and Bradshaw differed materially from that given by Bradshaw, in that he said that he told Bradshaw that he had been discharged from the case, thus telling him the truth in the matter, instead of a falsehood.”

In

Fernandez v. Western Fuse etc. Co., 34 Cal. App. 420, 423, 167 Pac. 900, 902 (1st Dist., 1917),

the court said:

“The fact that the defendant introduced testimony in rebuttal upon this same point does not now estop it from claiming that the testimony was erroneously admitted over its objection. In *Washington Township etc. Co. v. McCormick*, 19 Ind. App. 663, 667 [49 N. E. 1085, at page 1086], the court said: ‘Appellant in rebuttal introduced some evidence of the same general character as that objected to. But this

cannot be said to be a waiver of the objections to the evidence introduced by the appellee. It was not invited error. It does not fall within the rule that a party who calls out incompetent evidence thus precludes himself from successfully objecting to evidence of like character introduced by his adversary. . . . The error was committed at the instance of the opposite party, and appellant did all it could to prevent the error. After the court had held over appellant's objection that the evidence was competent, and had permitted appellee—who had the burden—to introduce such evidence to maintain his case, appellant, in seeking to overcome the case made by the appellee, could follow the theory laid down by the court without impliedly admitting the court's theory to be right, and without waiving his right to question the court's action. . . . ' ”

To the same effect is

DeRoulet v. Mitchel, 70 Cal. App. 2d 120, 125, 160 P. 2d 574, 577 (2d Dist., 1945):

“But because appellant contended at the trial that such issue was immaterial to a decision of the case she was not thereby inhibited from meeting the proof introduced by her adversary. Neither is she estopped from urging the error on appeal. It is the duty of any litigant in the course of trial to submit to the rulings with reference to the proof of the issues, and after he has done so he may thereafter on appeal demonstrate the error of the ruling to which he made timely objection.”

The latest expression of the rule which we have found is in

Hoel v. City of Los Angeles, 136 Cal. App. 2d 295, 310, 288 P. 2d 989, 998 (2d Dist., 1955).

The following extract from the opinion sufficiently illustrates the ruling:

“Because the attorney for defendant introduced the rest of the police report after this point had been ruled against him counsel for appellants say the error in receiving the extract was waived. Such is not the law. An attorney who submits to the authority of an erroneous adverse ruling, after making appropriate objections, does not waive the error in the ruling by introducing responsive evidence to offset or explain the erroneously admitted evidence so far as possible. He is entitled to make the best of a bad situation, not of his own creation. There is no element of waiver or estoppel in such conduct of counsel.”

The case of *Trouser Corporation v. Goodman & Theise*, 153 F. 2d 284 (3d Cir., 1946), cited by appellees, is plainly out of line with the current of authority on the subject. The court there, it is submitted, confused a situation where proof of the *fact* sought to be established by the improper testimony is made by the objecting party himself, which constitutes a waiver, and the situation where the objecting party offers testimony *denying* the fact sought to be proved by the improper evidence. The footnote on page 288 of the opinion recognizes this distinction, but it seems quite obvious that the court misapplied the rule to the facts before it.

United States v. Gruber, 123 F. 2d 307 (2d Cir., 1941), is not in point. There the defendant's evidence in effect admitted that certain charges of bribery (alluded to in plaintiffs' improper evidence) had in fact been made. Furthermore, it was pointed out that the court did not admit the testimony for the purpose of proving the truth of the alleged charges. *Bevard v. Bevard*, 103 F. Supp. 533 (D. D. C., 1952), is also not in point, as there the

fact established by the objectionable testimony was brought out by plaintiff's own cross-examination. *National Distillers P. Corp. v. Companhia Nacional, etc.*, 107 F. Supp. 65 (E. D. Pa., 1952), is likewise not exactly in point, as there the objecting party went beyond mere rebuttal, and attempted to use the same class of opinion evidence to which objection had been made to support his own case.

On principle, the rule established by the vast majority of the cases on this subject is unassailable. At the trial, Flintkote was confronted with objectionable hearsay evidence. It did everything in its power by objection, motion to strike and extended argument to induce the court to exclude the improper testimony. After that effort failed, Flintkote under any rational system of law should not be compelled upon pain of waiving its valid objection to concede the truth of the objectionable evidence. Flintkote was certainly entitled in this situation to call Mr. Ragland to the stand to deny the making of the alleged admissions and to produce the alleged participants in the alleged meeting to deny that any such meeting had taken place, and that the statements allegedly made at said meeting were entirely untrue. It seems clear that by so doing, Flintkote did not waive the original error, and after an adverse jury verdict, which may well have been influenced by the improper testimony, Flintkote may ask this Court for relief.

C. The Objectionable Testimony Was Highly Prejudicial.

There can be no reasonable argument that this highly colored and inflammatory testimony, particularly that of Lysfjord, did no damage to Flintkote. Nor is it true that appellant's own witnesses tended to prove the same facts. Lysfjord described an alleged general meeting between Howard, Krause, Newport and Lewis at which objections were made to the aabeta company being in busi-

ness. This, of course, suggested a concert of action, and was exactly contrary to all of the other evidence in the case, which was to the effect that Flintkote representatives called on the Flintkote contractors *individually*, stated that the plaintiffs were supposed to be doing business only in Los Angeles, that Flintkote proposed to investigate the situation, and that it would take such action, if any, as it in its own judgment thought appropriate. Apart from the possible suggestion of this hearsay testimony, the record stands uncontradicted that Flintkote made no promise or agreement with anybody to terminate relations with the plaintiffs.

This hearsay testimony also includes the statement (denied by all other witnesses) that Mr. Newport threatened to "boycott" Flintkote and spend a large sum of money to see to it that Flintkote materials were not used in the Los Angeles area unless the plaintiffs were cut off. Lysfjord also suggests that there was another "meeting" at the Flintkote office at which Mr. Krause is supposed to have become very abusive. Waldron's testimony about this alleged meeting is to the same general effect. These alleged meetings apparently were in addition to the conversations with the Flintkote contractors related by defendant's witnesses.

True enough, we have argued, and still argue that the evidence in this case, even if this testimony is accepted, falls short of proving knowing participation on the part of Flintkote in any conspiracy, and that this Court should find, even with this testimony in the record, that the trial court erred in denying defendant's motion to set aside the verdict. But if this Court disagrees with us on this matter, it must agree that the alleged Ragland declarations, if believed by the jury, would be influential in arriving at a verdict against Flintkote.

D. The Evidence With Respect to the Activities of Certain Contractors Should Not Have Been Admitted Without Requiring Plaintiffs First to Show Flintkote's Connection With the Alleged Conspiracy.

Plaintiffs do not seriously contend that there is any evidence that Flintkote participated in, or had any knowledge of the job allocation scheme suggested by the testimony admitted over Flintkote's objection, and with respect to which Flintkote's motion to strike was denied. They claim, however, that even if Flintkote did not know of this phase of the conspiracy, the evidence could be admitted to explain its intent and purposes.

We do not quarrel with the general principle that once a clear showing is made of a defendant's participation in a conspiracy, other conspiratorial activities of the persons involved can be shown, even though the defendant may not have actually participated in those other acts. Here, however, no participation by Flintkote in *any* conspiracy was proved. The court should have sustained defendant's objection to this line of testimony, and should have granted defendant's motion to strike it. For the reasons set out in the preceding section, defendant did not waive its objection to this testimony by presenting evidence that none of its employees and that none of the Flintkote contractors participated in or had any knowledge of the existence of any such scheme to allocate jobs and agree on bids. Nor was more than one objection and one motion to strike necessary.

If this Court agrees with us that the record does not justify a finding that Flintkote knowingly participated in any conspiracy, judgment should be entered for defendant, and the improper admission of this testimony could be disregarded. But if this Court should be of the view that there was enough evidence of a circumstantial character (the nature of which plaintiffs have been unable to

explain) to require submission to the jury of the issue of Flintkote's knowing participation in a conspiracy, there was still no possible justification in this case for not requiring the plaintiffs to follow the normal order of proof and establish Flintkote's connection with some conspiratorial act *before* permitting the presentation of this evidence as to the questionable practices of certain of the contractors. It is true that the courts have often said that the order of proof is in the trial court's discretion. It is also true in a case involving a large number of defendants, such as that referred to by appellees in the appendix to their brief, it may well be necessary to allow evidence to go in involving one or more of the defendants before a connection is shown with other defendants. But in this case there was no need for resorting to this practice. Here there was but one defendant. If plaintiffs had been required, as the trial court should have compelled them, to show Flintkote's knowing participation in some conspiratorial act before admitting this highly inflammatory testimony, the weakness or non-existence of the alleged connecting evidence would have been brought into sharp relief. Here, by allowing the activities of the contractors to be first presented for several court days, it seems clear that defendant was deprived of a fair trial. As we have pointed out in our opening brief, the jury necessarily was prejudiced against Flintkote by the mere presentation of this evidence that was admissible *only* on the assumption that Flintkote was in some way connected with it. It is altogether naive to contend that the damaging effect of the court's ruling was avoided because the testimony was admitted only subject to a motion to strike. Assuming, therefore, for the purpose of argument that there was a jury issue with respect to Flintkote's participation in a conspiracy, we earnestly contend that the trial court abused its discretion in sanctioning without any reason, and over objection, so prejudicial a departure from the normal order of proof in this case.

IV.

The Errors in the Jury Instructions Were Not Waived. Plaintiffs Have Failed to Show That the Instructions Were Not Erroneous.

At pages 63 through 86 of their brief plaintiffs attempt to answer Flintkote's contentions that the court erred in instructing the jury. Plaintiffs seem to be contending (1) that Flintkote waived any error in the instructions by failing to object thereto, and (2) that the instructions were correct as given. (Plaintiffs do not claim that Flintkote waived any objection with respect to the instructions on damages; those instructions are treated in a later section of their brief and will be similarly treated here.)

Plaintiffs' first, and apparently principal, contention in regard to instructions is that consideration of error therein is precluded at this time by reason of Flintkote's failure to comply with Rule 51, Federal Rules of Civil Procedure, and Local Rule 14 of the trial court regarding objections to instructions.

Flintkote's position is that the trial court was at all times aware of Flintkote's position in respect of the matters here specified as error, that full opportunity was presented to the court by Flintkote to consider Flintkote's position and instruct correctly, that no reasonable opportunity was presented to Flintkote specifically to object to the court's charge to the jury, that the court's instructions were not such that the errors therein could have been cured if Flintkote had objected more specifically when the charge was given, that, under the circumstances, the spirit and purpose of Rule 51 and Local Rule 14 were substantially complied with and neither of those rules should now prevent consideration of the error in the instructions.

It is clear that strict compliance with the terms of Rule 51 is not required in order to raise error in the instructions on appeal. This is especially so where the trial court does not see fit to follow the procedure provided by the rule. It is sufficient for the preservation of the point on appeal if the trial court has reasonably been made aware of the objecting party's position. The following cases all support all three of the foregoing sentences:

United States v. General Motors Corporation, 226 F. 2d 745 (3d Cir. 1955);

Irvin Jacobs & Co. v. Fidelity & Deposit Co. of Maryland, 202 F. 2d 794 (7th Cir. 1953);

Keen v. Overseas Tankship Corp., 194 F. 2d 515 (2d Cir.), *cert. denied*, 343 U. S. 966, 72 S. Ct. 1061 (1952);

Montgomery v. Virginia Stage Lines, 191 F. 2d 770 (D. C. Cir. 1951);

Green v. Reading Co., 183 F. 2d 716 (3d Cir. 1950);

Pfotzer v. Aqua Systems, 162 F. 2d 779, 783 (2d Cir. 1947);

Swiderski v. Moodenbaugh, 143 F. 2d 212 (9th Cir. 1944);

Alcaro v. Jean Jordeau, 138 F. 2d 767 (3d Cir. 1943);

Williams v. Powers, 135 F. 2d 153 (6th Cir. 1943);

Evansville Container Corporation v. McDonald 132 F. 2d 80 (6th Cir. 1942);

Sweeney v. United Feature Syndicate, 129 F. 2d 904 (2d Cir. 1942).

The *Irvin Jacobs* case, *supra*, and the discussion therein seem particularly pertinent here. At pages 800-801 of 202 F. 2d, the court said:

“Defendant asserts that the propriety of submitting to the jury the questions of compliance with or waiver of the bond provision in reference to proof of claim have not been preserved for review. Defendant argues that plaintiff should have requested a peremptory instruction which it failed to do, and further that three instructions given by the court on the question of the waiver actually were requested by plaintiff.

“In presenting requests for instructions, plaintiff’s counsel informed the court that he considered the questions of sufficiency of the proof of claim and waiver were clearly questions of law for the court, but the trial judge replied, ‘I think it is a question of fact.’ Counsel then replied, ‘Very well, then, they should be given as drafted.’ Defendant argues that this was an acquiescence by plaintiff and that it is now precluded from raising these points on appeal.

“Rule 46, Federal Rules of Civil Procedure, 28 U. S. C. A., provides that formal exceptions to rulings or orders of the court are unnecessary. Under Rule 51, the objection is sufficient so long as the trial judge understands plaintiff’s position. 5 Moore’s Federal Practice (2d Ed., 1951), Sec. 51.04, p. 2505. In *Moreau v. Pennsylvania R. Co.*, 3 Cir., 166 F. 2d 543, 545, the court said, ‘* * * Counsel must make his points clearly so that the trial judge may see what they are and if he believes they are right, follow them. But he is not required to indulge in reiterative insistence in order to preserve his client’s rights.’ It has also been held in a recent case, *Keen v. Overseas Tankship Corp.*, 2 Cir., 194 F. 2d 515,

certiorari denied 343 U. S. 966, 72 S. Ct. 1061, 96 L. Ed. 1363, that Rule 46 had been complied with and the point preserved for review where counsel made his point in a colloquy with the judge and had been overruled, even though counsel did not except to the ruling or the charge. The court stated, 194 F. 2d at page 519: “* * * Moreover, the plaintiff’s failure later to repeat the objection, or to conform literally to Rule 51, was not a “waiver” of the ruling against him; he had taken his position, had lost, and he was free thereafter to win a verdict if he could within the narrower borders of the case that the judge had laid down for him. Nothing goes further to disturb the proper atmosphere of a trial than reiterated insistence upon a position which the judge has once considered and decided.’ We hold that these questions raised by plaintiff were properly preserved for review.”

The matter of what was necessary to prevent waiver of error in the instructions was thoroughly considered in the *Montgomery* case, *supra*, where the court said, at page 773 of 191 F. 2d:

“If [the requested instructions] were submitted after the charge was made, or if they had been previously submitted and were pending and unacted upon when the charge was completed, objection to their denial should be deemed to have been made after the charge, reading Rule 51 with Rule 46.”

The *Green* case, *supra*, is as nearly “on all-fours” with the present case as one could reasonably expect. The court there analyzed the situation as follows (at p. 719 of 183 F. 2d):

“The plaintiff urges, nevertheless, that the error of the charge is not available to the defendant as an issue on this appeal because it made no objection

to the charge before the jury retired. Rule 51, Federal Rules of Civil Procedure. The defendant relies on its request for charge to indicate to the trial court the proper rule. . . .

“We have held that Rule 51 ‘is designed to preclude counsel from assigning for error on appeal matter at trial which he did not fairly and timely call to the attention of the trial court.’ *Stilwell v. Hertz Drivurself Stations, Inc.*, 3 Cir., 1949, 174 F. 2d 714, 715; *Alcaro v. Jean Jordeau, Inc.*, 3 Cir., 1943, 138 F. 2d 767, 771. But it is likewise true that ‘there is no good reason for applying the rule so indiscriminately as to prevent counsel from pointing out on appeal matter which he did endeavor to identify to the trial court and which he had every reason to believe the court fully comprehended when granting an exception.’ *Alcaro v. Jean Jordeau, Inc.*, supra, 138 F. 2d at page 771. In the instant case, the learned trial judge in lieu of the procedure of Rule 51, did not rule upon the requests for instructions until after the charge to the jury had been given. Upon the conclusion of the charge, he stated that he thought he covered the requests rather generally, but to protect the parties he would refuse the requests and allow exceptions thereto. Then, counsel were asked whether there were any ‘other’ exceptions, and counsel for defendant replied in the negative. This was certainly the equivalent of saying, ‘Defendant has no suggestions for correction of your charge other than those contained in defendant’s requests.’ *Alaska Pacific Salmon Co. v. Reynolds Metals Co.*, 2 Cir., 1947, 163 F. 2d 643, 658. Patently, the trial judge granted an exception to such parts of the charge as were inconsistent with, or did not properly cover, the parties’ requests. We have no doubt that, despite the alleged errors in the

defendant's request here involved, it was sufficiently specific to direct the attention of the court below to the issue and to the law, that it was adequate to indicate the error of the charge, and that the court comprehended the issue when it granted the exception following the charge. As we held in *Moreau v. Pennsylvania R. Co.*, 3 Cir., 1948, 166 F. 2d 543, 545, 'Counsel must make his points clearly so that the trial judge may see what they are and if he believes they are right, follow them. But he is not required to indulge in reiterative insistence in order to preserve his client's rights.' We conclude, therefore, that the issue here involved was fairly and timely within the cognizance of the trial court, and that the substantive spirit of Rule 51 is satisfied. Cf. *Pfotzer v. Aqua Systems, Inc.*, 2 Cir., 1947, 162 F. 2d 779, 783; *Sweeney v. United Feature Syndicate, Inc.*, 2 Cir., 1942, 129 F. 2d 904, 905-906. Parenthetically, it may be noted that the defendant included the issue asserted by it on this appeal in its motion for a new trial, which was denied."

In the present case, Flintkote's position was fully presented to the court by its requests for instructions prior to the commencement of the trial. At the initial conference of counsel and the court in chambers immediately prior to the trial, Flintkote objected to references to defendants and to a verdict against some but not all defendants contained in instructions proposed by plaintiffs (R. 155-156). At that time the Court indicated that an instruction conference would be had for the purpose of "getting the bugs out of the charges that they have been submitted." (R. 157.) No such conference was had. At the close of all the evidence and prior to argument by counsel to the jury, the court advised counsel that it wished to "simply read the charg-

ing language of the amended complaint, the relevant portions of the statute involved, give the classical definition of conspiracy and the necessity of finding that this defendant was a member of the particular conspiracy, and then get into damages doing it as best I can as a condensation from these long instructions you have given, . . .” (R. 1221.) The court’s statement of its intentions certainly sounded reasonable enough and indicated that the court reasonably comprehended the scope and nature of the charge required. It gave counsel no warning of the erroneous and prejudicial charge which was actually given. An examination of the charge as given will demonstrate that it was disorganized, confusing, erroneous, and internally contradictory. Counsel for Flintkote specified the errors in the charge which they had specifically noted. Nowhere did they indicate satisfaction with the charge as given. Flintkote was never given an adequate opportunity to review the court’s charge and object thereto, and both Rule 51 and Local Rule 14 contemplate that counsel shall be given such opportunity. Since the trial court did not see fit to comply with the rules, it would be incongruous to expect that counsel would or could comply strictly with the letter of those rules; substantial compliance with the spirit and purpose of the rules should be enough; Flintkote contends that it did so comply and that the error is preserved to it in this appeal.

“Rules of practice and procedure are devised to promote the ends of justice, not to defeat them. A rigid and undeviating judicially declared practice under which courts of review would invariably and under all circumstances decline to consider all questions which had not previously been specifically urged would be out of harmony with this policy. Orderly rules of procedure do not require sacrifice of the rules of fundamental justice.”

Hormel v. Helvering, 312 U. S. 552, 557, 61 S. Ct. 719, 721 (1941).

The authorities cited by plaintiffs at pages 64 and 65 of their brief in no way militate against the position of Flintkote in this connection. The *Zermani* case (200 F. 2d 240), from which plaintiffs quote headnote 4, involved a situation where the appellate court (1) analyzed the instructions and found them adequate and (2) stated that "furthermore" appellate had not, on the facts there presented, adequately complied with Rule 51. *Stikwell v. Hertz Drivursel Self Stations*, 174 F. 2d 714 (3d Cir. 1949), from which plaintiffs "quote" a modified form of headnote 2, involved a situation where no instruction was requested, no objection was ever made to the instructions at any time, and appellant's position was, apparently, never presented to the court at all. *State Farm Mut. Auto Ins. Co. v. Porter*, 186 F. 2d 834 (9th Cir. 1950), did not involve the situation here presented and was concerned only with the entirely unrelated question of whether the evidence supported the verdict. *Las Vegas Merchant Plumbers Ass'n v. United States*, 210 F. 2d 732 (9th Cir. 1954), is not at all in point. That case approved a procedure on instructions which was not in strict compliance with Rule 30, Federal Rules of Criminal Procedure. The procedure followed here was not even similar. The court also noted the failure of counsel suitably to set out in its brief the errors in the charge which were complained of, but it should be noted that this court nevertheless reviewed the claimed errors. *Thorp v. American Aviation and General Insurance Co.*, 212 F. 2d 821 (3d Cir. 1954), involved a case where the charge was, to say the least, more than merely favorable" to appellants (212 F. 2d at 825); where the instructions conformed with appellants' view of the law as declared to the trial judge; where there was no objection to the charge of any kind; and where the appellate court could say that "This contention comes with mighty poor grace from the defendants" (212 F. 2d at 824). Even

in this case, however, the court recognized that absolute compliance with Rule 51 is not always necessary to preserve errors in instructions on appeal. *Allen v. Nelson Dodd Produce Co.*, 207 F. 2d 296 (10th Cir. 1953), was a case where appellant presented no requests for instructions and made only a very general objection to the court's instructions as given. The court stated the general rule in terms of "ordinarily" and went on to note the court's power to review fundamental error whether or not saved by objection. In *Harlem Taxicab Ass'n v. Nemesh*, 191 F. 2d 459 (D. C. Cir. 1951), the court found that appellant's position had been adequately presented to the trial court and reversed on the ground of erroneous instructions saying that strict compliance with Rule 51 would have been "only a formality" (p. 461). In *Smith v. Welch*, 189 F. 2d 832 (10th Cir. 1951), the court recognized that Rule 51 did not constitute an absolute bar to consideration of errors in instructions, but held that in that case the facts did not warrant departure from the express terms of the rule. *Boston Ins. Co. v. Fisher*, 185 F. 2d 977 (8th Cir. 1950), was a case where apparently no attempt was made to call appellant's position to the attention of the trial court at any time. The court recognized its power to notice "obvious error" (p. 979) but concluded that was not the proper case. We have heretofore discussed *Green v. Reading Co.*, *supra*, and have demonstrated that it held the error in the instructions was preserved for appeal in a case remarkably similar to this one. *Hansen v. St. Joseph Fuel Oil & Manufacturing Co.*, 181 F. 2d 880 (8th Cir. 1950), was a case where the court recalled the jury at the suggestion of counsel for appellees and corrected the error assigned as grounds for reversal.

The foregoing should establish that the error in the instructions was sufficiently preserved for consideration here. The trial court was at all times aware of Flint-

kote's position and had been furnished with a complete and correct set of instructions by Flintkote. There was no point in "reiterative insistence" by counsel.

We do not believe that resort to the "plain error" doctrine is necessary to enable this court to consider the errors in the instructions to the jury. There is, however, a general doctrine that an appellate court may consider error not raised below when necessary to prevent injustice. For discussions of this doctrine and the rationale therefor see

Shokuwan Shimabukuro v. Higeyoshi Nagayama,
140 F. 2d 13, 15-16 (D. C. Cir.), *cert. den.*,
332 U. S. 755, 64 S. Ct. 1270 (1944);

Dowell v. Jowers, 166 F. 2d 214, 221 (5th Cir.),
cert. den., 334 U. S. 832, 68 S. Ct. 1346 (1948);

Hormel v. Helvering, *supra*.

We recognize that this Court has stated that the "plain error" doctrine is not applicable in this Circuit (*Woodworkers Tool Works v. Byrne*, 191 F. 2d 667, 676 (9th Cir. 1951); *Persons v. Gerlinger Carrier Company*, 227 F. 2d 337, 343 (9th Cir. 1955), but we respectfully request that, if it should be necessary to resort to that doctrine, this Court reconsider its prior statements and prevent the obvious miscarriage of justice which would result if this judgment were not reversed.

No attempt will be made here to reply in detail to plaintiffs' arguments that the instructions were correct, as Flintkote's position in respect of each of the claimed errors is adequately developed in its opening brief. There are, however, a few statements to which Flintkote believes a direct reply is in order.

Plaintiffs have selected portions of the trial court's instructions to the jury which were correct and contend that they suffice to cure the errors complained of. It is

not Flintkote's contention that every statement in the instructions was erroneous. It is agreed that portions were correct. Flintkote does contend, however, that portions of the instructions were incorrect and that prejudicial error requiring a reversal was committed thereby.

At page 72 of their brief (and elsewhere therein) plaintiffs accuse Flintkote of quoting "fragmentary and disconnected parts of the Court's instruction . . . in an apparent attempt to obscure the patent fairness of the Court's charge in this respect." Obviously Flintkote could not set forth the court's entire charge in connection with each specification of error therein, and some identification of the erroneous portions of the charge was imperative in order to frame the issue. To call an attempt to demonstrate wherein a charge was unfair and incorrect an attempt to obscure its fairness is wholly unnecessary and itself merely serves to becloud the issues fairly and properly framed. It should be noted that at no point in their brief do plaintiffs attempt to show that any of the matters designated as erroneous in Specifications of Error numbers 5, 6, 7 and 8 were not erroneous (except for their attempt at pages 73-76 to place this case in the *per se* class, which does not accord with the proof) and in no other manner did they squarely meet any other issue framed by Flintkote with regard to the errors in the instructions.

We have previously adverted to plaintiffs' attempt to place this case in the category of *per se* violations of the Sherman Act (*supra*, pp. 6 to 8). We respectfully refer to that discussion in connection with plaintiffs' remarks at pages 73-76 and 84-85 of their brief. (We also wish to except to the sentence beginning near the bottom of page 84 and continuing on page 85 as a misstatement of the facts and to the characterization "admitted restraint" therein.)

At pages 84 and 85 of their brief plaintiffs argue that Flintkote has not made a sufficient showing that the errors in the instructions were prejudicial. It is submitted that in each case Flintkote has demonstrated the substantial possibility that the error complained of adversely affected the verdict. That is all the showing of prejudice that can be required.

“ . . . if error is shown, then there should be a reversal ‘unless it *affirmatively* appears from the whole record that it was not prejudicial’.”

Lynch v. Oregon Lumber Co., 108 F. 2d 283, 286 (9th Cir. 1939).

It is submitted that plaintiffs’ attempt to distinguish the *Voss* and *Applebaum* cases (at page 84 of their brief) is specious and that the cases are in fact entirely in point here.

V.

This Court May Review the Trial Court’s Action in Denying the Motion for New Trial.

In section IV of their brief, plaintiffs attempt to reply to Flintkote’s contention (Specification of Error No. 11) that the trial court abused its discretion in failing to grant Flintkote’s motion for new trial on one or more of three separate grounds. Plaintiffs’ principal argument in that connection is that the trial court’s action in respect of a motion for new trial “based as here upon the weight of the evidence is a matter entirely within the discretion of the trial court, and . . . is not reviewable by an appellate court.” (App. Br. 86.) Plaintiffs cite and quote from several cases in support of that proposition. Examination of those cases will disclose, however, that all of them (except *Shingle*) recognized that the rule stated is not absolute, and that the appellate court may reverse where the trial court failed to exer-

cise its discretion or abused it, and *Shingle* did not purport to discuss the many ramifications of the rule therein stated.

See also:

Minneapolis, St. P. & S. S. M. Ry. Co. v. Moquin,
283 U. S. 520, 51 S. Ct. 501 (1931);

Glasser v. United States, 315 U. S. 60, 87, 62
S. Ct. 457, 472 (1942).

There should be no question but that the trial court's ruling on Flintkote's motion for new trial is subject to review by this Court. The motion was made on each of the following grounds:

"(a) Substantial and prejudicial errors of law were committed in the course of the trial.

"(b) The verdict of the jury is not supported by legally sufficient evidence.

"(c) The verdict of the jury is against the weight of the evidence.

"(d) The damages assessed by the jury are excessive." (R. 105.)

The motion was denied (R. 148). The trial court's errors of law mentioned in the first ground above are subject to review by this Court independently of whether the trial court erred in denying a new trial because of them, and thus, whether the trial court erred in the denial of the new trial on that ground is immaterial at this point and need not be considered and is not urged by Flintkote.

Error in ruling upon a motion for new trial upon the ground that the verdict is not supported by legally sufficient evidence constitutes an error of law and is clearly subject to review by this Court.

Covey Gas & Oil Co. v. Checketts, 187 F. 2d 561,
562 (9th Cir. 1951);

Boyle v. Bond, 187 F. 2d 362 (D. C. Cir. 1951);
Feinsinger v. Bard, 195 F. 2d 45 (7th Cir. 1952);
Reisberg v. Walters, 111 F. 2d 595 (6th Cir.
1940);

*Barnsdall Refining Corp. v. Cushman-Wilson Oil
Co.*, 97 F. 2d 481 (8th Cir. 1938).

Here Flintkote claims that the evidence was insufficient to support the verdict in two respects: (1) the evidence was insufficient to show knowing participation by Flintkote in any conspiracy (this was the subject of Flintkote's motion to set aside the verdict and enter judgment for Flintkote), and (2) the evidence was insufficient to sustain the amount of damages assessed. It should be noted that neither of these matters should be the subject of any discretion in the trial court, and that the trial court's failure to grant a new trial where either of those conditions appear would be substantial and prejudicial error warranting a reversal by this Court.

The motion for new trial on the ground that the verdict is against the weight of the evidence is, we agree, addressed to the sound discretion of the trial court, and it is reviewable only for abuse of that discretion.

6 Moore, Federal Practice 3820, 3902 (1953).

Moore recognizes that the appellate court may review the trial court's action under "unusual or special circumstances" (*ibid.*), and the following cases all recognize the power of the appellate court to prevent abuse of discretion:

Aetna Casualty & Surety Co. v. Yeatts, 122 F.
2d 350, 355 (4th Cir. 1941);

Daffinrud v. United States, 145 F. 2d 724, 725
(7th Cir. 1944);

Charles v. Norfolk & Western Ry. Co., 188 F. 2d 691 (7th Cir.), *cert. den.*, 342 U. S. 831, 72 S. Ct. 55 (1951);

Metzger v. Spector Motor Service, 119 F. 2d 690 (2d Cir. 1941);

Atlantic Coast Line R. Co. v. Hadlock, 180 F. 2d 105 (5th Cir. 1950);

Hill v. Pennsylvania Greyhound Lines, 174 F. 2d 171 (3d Cir. 1949);

Missouri K. & T. Ry. Co. v. Jackson, 174 F. 2d 297 (10th Cir. 1949);

Marsh v. Illinois Cent. R. Co., 175 F. 2d 498 (5th Cir. 1949);

Trout v. Cassco Corp., 191 F. 2d 1022 (4th Cir. 1951);

See, also, cases cited in connection with review on the ground that damages are excessive, *infra*.

In the *Hill* case, *supra*, the court said (at p. 172 of 174 F. 2d):

“We are not on this appeal concerned with weighing the evidence. We are very much concerned with whether the District Judge abused his discretion in refusing to allow a new trial. In other words, does the record below justify the action of the lower court?”

In the *Charles* case, *supra*, after reviewing the authorities, the Court of Appeals for the 7th Circuit reversed the trial court on the ground that it had abused its discretion in failing to grant a new trial, saying (at p. 695 of 188 F. 2d):

“In this situation, we think there was a miscarriage of justice. It is one of the exceptional cases which call for a reversal.”

The foregoing authorities make it clear that this Court has the power to review the trial court's action to determine whether it abused its discretion and, if so, to rectify the situation by remanding the case for a new trial. At pages 92-99 of its opening brief, Flintkote reviewed the evidence in an attempt to demonstrate that the verdict was so clearly against the weight of the evidence that to permit the verdict to stand would result in a manifest miscarriage of justice and that the court's failure to grant a new trial was a gross abuse of its discretion warranting reversal here. It is submitted that plaintiffs have pointed to nothing in the record which invalidates Flintkote's prior arguments or any portion thereof.

The final ground of Flintkote's motion for a new trial was that the damages were excessive. This Court clearly has the power to review the trial court's action on that motion.

Cobb v. Lepisto, 6 F. 2d 128 (9th Cir. 1925);

Department of Water and Power v. Anderson, 95 F. 2d 577 (9th Cir.), *cert. den.*, 305 U. S. 607, 59 S. Ct. 67 (1938);

Covey Gas & Oil Co. v. Checketts, 187 F. 2d 561 (9th Cir. 1951);

Baldwin v. Warwick, 213 F. 2d 485 (9th Cir. 1954);

Southern Pac. Co. v. Guthrie, 180 F. 2d 295 (9th Cir. 1949), 186 F. 2d 926 (9th Cir.), *cert. den.*, 341 U. S. 904, 71 S. Ct. 614 (1951);

Virginian Ry. Co. v. Armentrout, 166 F. 2d 400 (4th Cir. 1948).

See also:

Southern Pac. Co. v. Zehnle, 163 F. 2d 453 (9th Cir. 1947);

Estabrook v. Butte, Anaconda & Pacific Ry. Co., 163 F. 2d 781 (9th Cir. 1947).

This problem was fully considered and the authorities were carefully reviewed by this Court, sitting *en bank*, in

Southern Pac. Co. v. Guthrie, 186 F. 2d 926
(9th Cir.), *cert. den.*, 341 U. S. 904, 71 S. Ct.
614 (1951).

The majority of the court concluded that it had the power to review the trial judge's action if the verdict was "grossly excessive" or "monstrous," but that the verdict could not be so characterized in that case. Judge Bone concurred in the result, but did not approve of the doctrine that the appellate court "may arbitrarily reduce the size of a verdict merely because it regards it as excessive" (p. 933). Chief Judge Denman dissented because he believed the facts warranted the relief sought. Judge Stephens dissented in a skillful disapproval of "the so-called 'monstrous' doctrine" (p. 934). Judge Mathews concurred in both dissents. In addition to recognizing a general power in the appellate court to review for excessiveness of the verdict, the Court expressly recognized several other grounds upon which it could review the action of a trial court in ruling on a motion for new trial. At page 931 of 186 F. 2d, the Court said:

"We put to one side those cases in which it can be demonstrated that the verdict includes amounts allowed for items of claimed damage of which no evidence whatever was produced. Such total want of evidence upon a portion of the case would give rise to a question of law in the same manner in which a question of law is presented when, upon motion for a directed verdict, there appears an insufficiency of evidence as to the whole case."

The Court cited

Campbell v. American Foreign S. S. Corporation,
116 F. 2d 926, 928 (2d Cir.), *cert. den.*, 313
U. S. 573, 61 S. Ct. 959 (1941),

where an allowance of maintenance and cure over an estimated 3 year period was reversed on the ground that there was no proof that plaintiff's incapacity would last for 3 years. In all of the following cases, the appellate court reviewed the evidence to determine whether it was sufficient to support the verdict in respect of the damages found and held that it did not:

Boyle v. Bond, supra;

Covey Gas & Oil Co. v. Checketts, supra;

Feinsinger v. Bard, supra;

Reisberg v. Walters, supra (where the court reversed on the ground that the jury failed to include undisputed items of damage in the verdict);

Barnsdall Refining Corp. v. Cushman-Wilson Oil Co., supra.

The above cases indicate that the trial court has no discretion in ruling on the motion for new trial on the ground that the verdict as to damages is not supported by the evidence, and the trial court should be reversed if it erred in its ruling, without regard to any inquiry into whether the verdict was "grossly excessive" or "monstrous" (or, otherwise stated, those cases indicate that a verdict which is not supported by substantial evidence in some particular or particulars is "grossly excessive" or "monstrous" as a matter of law).

At pages 122 through 133 of its opening brief, Flintkote has demonstrated (1) that the evidence was insufficient to sustain a finding of the fact of injury in respect of "lost profits," (2) that the evidence was insufficient to sustain any finding of the amount of damages sustained by reason of any injury in respect of "lost profits," (3) that the verdict greatly exceeded the amount of damages proved in respect of injuries proved (San Bernardino expense and increased cost of tile) and thus must necessarily have been based on "lost profits." In their brief, plaintiffs have not pointed to anything in the record which supplies or even tends to supply any of the deficiencies in proof of the fact of injury in respect of "lost profits" or the amount of plaintiffs' damages in respect thereof to which Flintkote adverted in its brief. It is not disputed (assuming that the evidence is sufficient in other respects, which we do not concede) that the evidence might support a verdict in any amount up to \$3,514.75 on a correct theory of the damage period or \$14,678.54 on the trial court's incorrect theory (Flintkote's Op. Br., pp. 131-132), but it is contended that a verdict in any larger sum is wholly unsupported by any competent evidence, and the trial court's denial of a new trial on that ground was a clear error of law requiring a reversal of the judgment and a new trial of the action. It is further contended that the damages fixed by the jury were, in view of the evidence presented, so grossly excessive as to be indeed "monstrous"; that the trial court's failure to grant a new trial on that ground constituted a clear abuse of discretion and warrants a reversal of the judgment by this Court.

VI.

The Damages Were Excessive. Numerous Errors Were Committed in Connection Therewith.

In section V of their brief (at pp. 88-111) plaintiffs seek to lump together three entirely separate contentions of Flintkote: (1) The court erred in instructing the jury and admitting evidence with respect to acts done subsequent to the commencement of the action (pp. 100-109 of Flintkote's Op. Br.), (2) The court erred by permitting evidence to be introduced which allowed damages to be based on speculation (pp. 110-114 of Flintkote's Op. Br.), (3) the court abused its discretion in failing to grant a new trial on the ground that the damages fixed by the jury were excessive (pp. 115-133 of Flintkote's Op. Br.). Flintkote recognizes that those problems are similar in that they all relate to damages. Each problem is, however, entirely separate and independent from the others, and any attempt to discuss all of them at the same time leads only to confusion. Therefore, despite plaintiffs' lumping of the issues, we shall persist in treating them separately in this reply.

A. The Court Erred in Permitting Recovery for Acts Done After the Suit Was Filed. This Error Was of Major Importance.

In our opening brief (pp. 100-109) we pointed out the trial court's error in permitting the plaintiffs to recover damages for wrongful acts done after the filing of the complaint (which must be covered, if at all, by a separate action or perhaps by supplemental complaint).

And even more serious, the court allowed recovery for acts which were not unlawful at all, because con-

tinued refusal to sell tile to plaintiffs after the conspiracy ended would not be actionable—and there was no evidence that any conspiracy (participated in by Flintkote or otherwise) continued after the suit was filed.

Refusal to supply tile to the plaintiffs under the applicable authorities must be treated as a series of day-to-day acts, and only such of those acts as occurred before the commencement of the action can be the basis of any recovery.

Plaintiffs have not effectively answered this contention. They refer to the case of *Bigelow v. RKO Radio Pictures*, 327 U. S. 251, 66 S. Ct. 574 (1946), as applying the rule for which we contend, and to the case of *Twentieth Century-Fox Film Corp. v. Brookside Theatre Corp.*, 194 F. 2d 846 (8th Cir.), *cert. den.*, 343 U. S. 942, 72 S. Ct. 1035 (1952), as illustrating what they say is “the other type of situation.” Neither case is actually in point. True, in *Bigelow* the plaintiff brought one action to recover damages for wrongful refusal to supply film on favorable terms up to the time of commencement of suit, and later a second, supplemental action to recover further damages resulting from such failure to supply for a subsequent period commencing with the date of the earlier action. But *Bigelow* does not discuss the rule, even though the pattern taken by the litigation indicates that its correctness was assumed.

Brookside is simply inapplicable to our case. It does not stand for a rule, as plaintiffs seem to say it does, that upon a wrongful refusal to sell merchandise, absolute in terms, a plaintiff may recover (trebled) all of the profits he might have made in perpetuity, or up to the trial, or for any other specified period. In *Brookside*, it was found that defendants’ conduct (consisting of a multitude of restrictive conspiratorial practices in addition to a refusal to license pictures “on terms enjoyed by defendants’ controlled picture houses”) “had the effect of making it impossible for plaintiff to successfully oper-

ness, forcing it to sell to a corporation controlled by or participating in the conspiracy or combination created by the defendants" (194 F. 2d at 850). Among the assets which plaintiff was forced to sell was its 15-year leasehold interest in its theater. The court held that the profits earned and to be earned by the buyer during that 15-year lease could be taken into account in determining the value of the right to continue business, of which the plaintiff was deprived by the wrongful act of the defendants" (p. 855 of 194 F. 2d). The case involved the destruction of a business and a forced sale thereof. The damages were awarded for the wrongful deprivation of plaintiff of its right to continue in business, not merely for the injuries sustained through possible restriction of its business by reason of refusals to sell, and the court made it clear that the problem before it was one of valuation of a business (194 F. 2d at 854).

There was a long delay between the time of the forced sale and the trial and plaintiff was able to prove from books produced by defendants what the theater actually earned in the hands of the purchaser corporation during most of the 15-year leasehold term. The trial court told the jury that it might consider the profits the theater had earned "*not as fixing the measure of damages*" but merely as "an element to be taken into consideration" in determining what damage the plaintiff had sustained (194 F. 2d at 854). The appellate court specifically stated that this limited use of the evidence of profits made was not inconsistent with defendants' contention that plaintiff's damages were limited to the difference between what plaintiff received from the sale of its property and the fair market value of that property on that date.

That this case bears no semblance to our situation is plain. Here, there is nothing more than refusal to sell Flintkote tile to plaintiffs. Plaintiffs' business was not destroyed. Plaintiffs were not forced to sell their busi-

ness to a nominee or subsidiary of defendant, or at all. Plaintiffs were not deprived of a valuable lease or any equipment or other property. It is undisputed that plaintiffs continued in business through the time of the trial and that plaintiffs have at all times made a profit in that business.

The case at bar is controlled by *Connecticut Importing Co. v. Frankfort Distilleries*, 101 F. 2d 79 (2d Cir. 1939); *Frey & Son v. Cudahy Packing Co.*, 243 Fed. 205 (D. Md. 1917), *reversed* on ground that no combinatoin in restraint of trade proved, 261 Fed. 65 (4th Cir. 1919), and the other decisions cited in our opening brief, holding that wrongful refusal to sell is "a mere repetition or continuation of acts of the same class as that for which the suit was brought" (243 Fed. at 205). In such cases, it is clear that plaintiffs' recovery is limited to the damages for injuries resulting from such of those acts as were done before the bringing of suit. Here there was no contractual commitment to sell plaintiffs tile. Assuming that the initial refusal to sell to plaintiffs was the result of a conspiracy, the continuing refusal to sell would cease to be wrongful as soon as the conspiracy stopped. If the refusal to sell tile continued after the suit was brought, plaintiffs would have to recover, if at all, for the injury resulting from such continued refusals to sell by filing a separate suit, as was done in *Bordonaro Bros. Theatres v. Paramount Pictures*, 203 F. 2d 676, 677 (2d Cir. 1953), or by supplemental action, as was done in *Bigelow* (see 162 F. 2d 520). In either case plaintiffs would have to show that the conspiracy continued after the date of commencing the first suit.

Plaintiffs fail completely in their attempt (App. Br., p. 104) to distinguish our case from these decisions. Here, just as in the cases we cite, there was implied in law a day-to-day continuing refusal to sell to plaintiffs. There was not in those cases, just as there was not here, any

express further demand for merchandise, or any *express* further refusal to supply after the initial refusal took place. In those cases, as here, defendant's policy of refusal to sell could have changed at anytime.

Clearly damages resulting from failure to supply merchandise after the suit was commenced could not be recovered in this action and the trial court erred in allowing the jury to award damages to plaintiffs resulting from inability to purchase tile from Flintkote after July 21, 1952.

The error was of major importance. If the correct rule of damages had been applied by the court, the maximum amount of damage supported by the record would have been \$3,514.75. This figure is the sum of plaintiffs' out-of-pocket expenses at San Bernardino, \$1,920.00, and the increased cost of tile (that is, the excess paid over what it could have been purchased for from Flintkote) for the entire year 1952, \$1,594.75 (Ex. "K"). Three times \$3,514.75 equals \$10,544.25. Plaintiffs have already received from former defendants the sum of \$20,000; hence, even if the trial court's disposition of the \$20,000 payment is adopted, plaintiffs have already been paid \$9,455.75 more than treble the maximum amount of damage plaintiffs have proved. Plaintiffs therefore should have recovered nothing. Yet the judgment was for \$130,000, plus attorneys' fees of \$25,000, plus costs, or a total of \$155,165.70.

B. The Court Erred in Permitting Speculative Evidence of Damages.

Plaintiffs have cited several cases where expert opinion testimony was admitted in connection with the fixing of damages by reason of lost profits. Flintkote agrees that in a proper case the testimony of *experts* may be used for such purpose, if the evidence shows that the experts are suitably qualified to make their estimates and

if there is evidence on the basis of which the experts can make rational estimates.

It is Flintkote's position that plaintiffs were not qualified as experts on business prognosis and that the evidence is insufficient to enable even a real expert to estimate the profits which they might have made had they been able to buy tile from Flintkote. None of the cases cited by plaintiffs stand for (or even involve) any proposition that a party litigant may speculate upon his damages without any factual basis for his estimates or any showing of his qualifications to make those estimates.

C. The Court Abused Its Discretion in Failing to Grant a New Trial on the Ground That the Damages Were Excessive.

We have heretofore demonstrated (pp. 43 to 46, *supra*) that this Court has full power to review the trial court's action in regard to Flintkote's motion for new trial on the ground that the damages were excessive.

Flintkote's principal contention in this regard is that the evidence is insufficient to support the jury's verdict. It is conceded that (assuming, without conceding, that the evidence is sufficient to show that Flintkote's acts were wrongful) the evidence is sufficient to support both the fact of injury and the amount of the damages necessary to compensate therefor in respect of increased cost of tile and San Bernardino expense. The total of those two items, as shown by the evidence, cannot exceed \$14,678.54 even on the plaintiffs' erroneous figures applicable to the period erroneously fixed by the trial court (Flintkote's Op. Br., pp. 131-132), which leaves a minimum of \$35,321.46 of the verdict to be accounted for on some other basis. The only other respect in which plaintiffs suggested that they might have been injured was in respect of profits lost on business not done. The issue is whether the evidence is sufficient to support a finding that plaintiffs were injured in respect of lost profits and whether

the evidence was sufficient to provide a reasonable basis for the calculation of damages in respect of injury in that respect, if such injury was proved.

Pages 122 through 131 of Flintkote's opening brief were devoted entirely to an attempt to show that the evidence was utterly inadequate to support a finding that plaintiffs were injured in respect of profits lost. Plaintiffs' statements in their brief that "the fact of damage — is not disputed in the record and is ignored in the argument of appellant" (p. 88), that "*the fact of damage is clear and cannot be controverted herein*" (p. 89), and that Flintkote's "sole contention relates to the measurement of damages" (p. 89) completely ignore the basic point of the discussion above referred to.

Plaintiffs cite and quote from many cases to establish the proposition that damages may be recovered in respect of profits lost by reason of the wrongful act of a defendant. This proposition is not now and never has been disputed by Flintkote. Flintkote merely contends that plaintiffs must prove injury by reason of profits lost before they may recover damages in respect thereof and that they have utterly failed in such proof here. (Plaintiffs' cases to the effect that rational estimates of damages in respect of injuries proved are permissible do not, of course, tend to dispense with the requirement that the injury be clearly proved.)

Flintkote's thesis that the evidence was insufficient to establish injury in respect of profits lost was stated and developed at some length at pages 122-131 of its opening brief, and the basic law applicable to damages in situations similar to this was fairly and fully stated at pages 115-119 of that opening brief. There is no reason apparent for repeating that argument here. We wish to point out, however, that nowhere in their brief do plaintiffs attempt to show that any of the matters which Flintkote referred to as unproved were proved or that proof of those matters was unnecessary.

Plaintiffs seem to find some significance in the fact that Flintkote offered little evidence with respect to whether plaintiffs were injured or the amount of damages sustained by them. Certainly plaintiffs do not contend that any burden of proving or disproving either of those matters rested on Flintkote. If plaintiffs are to recover for their injuries, *they* must prove the fact of the injury and provide a measure for the damages necessary to compensate therefor. That plaintiffs failed to do. They can receive no comfort from the fact that Flintkote did not go ahead and provide the proof they failed to produce, assuming such proof might have been made.

VII.

The Attorney's Fees Allowed by the Trial Court and Claimed in This Court Are Excessive.

We do not intend to repeat the argument in our opening brief that the trial court's award of \$25,000 for attorney's fees was excessive. The reasonableness of an attorney's fee does not of course depend on any one factor, but it is not true, as plaintiffs assert, "that the amount of recovery in an antitrust case does not constitute a principal factor in arriving at a reasonable fee". As a general rule, one *starts* with the results obtained in appraising the value of legal services. It is clear from the authorities we cited in our opening brief that the fee, in the absence of other extraordinary circumstances, must bear some reasonable relation to the amount of damages awarded. This means the actual damages as determined by the verdict, and not as trebled. In *Twentieth Century-Fox Film Corp. v. Brookside Theatre Corp.*, 194 F. 2d 846, 859 (8th Cir. 1952), the court said:

"The damages were assessed by the jury at \$375,000. This was the only recovery that may be attributable to the services of counsel for plaintiff as it was through no effort of theirs that these damages were trebled."

To the same effect is

Milwaukee Towne Corp. v. Loew's, 190 F. 2d 561, 571 (7th Cir. 1951), *cert. den.*, 342 U. S. 909, 72 S. Ct. 303 (1952).

The case of *Paramount Film Distributing Corp. v. Village Theatre*, 228 F. 2d 721, 727 (10th Cir. 1955), cannot be relied upon as authority to the contrary. There, injunctive relief was awarded as well as damages, which may well have been an important component of the results obtained by the plaintiff. Furthermore, the Court of Appeals in that case expressly stated that it did not pass on the question presented to it that the District Court's allowance of attorneys' fees was too high; as the case was reversed, the award of attorneys fees was set aside *in toto*.

Plaintiffs have served and filed a petition for attorney's fees on appeal, praying an award in the amount of \$13,000. Even if plaintiffs are completely successful in defending against this appeal, an allowance of \$13,000 seems extraordinarily high. It is true that plaintiffs' counsel alleges that he has spent in excess of 350 hours in connection with the appeal. While the time devoted to a piece of work is of course one factor that must be taken into account, it is by no means controlling, and it is difficult to understand why such heavy expenditure of time was reasonably required. Ordinarily it would seem that an allowance of about half of what plaintiffs are claiming for attorney's fees would approach the upper limits of reasonableness. In *American Crystal Sugar Co. v. Mandeville Island Farms*, 195 F. 2d 622, 626 (9th Cir.), *cert. den.*, 343 U. S. 957, 72 S. Ct. 1052 (1952), cited by plaintiffs, this court made an allowance of \$4,000 for services in connection with the appeal in a case where the trial court awarded \$25,000 to cover attorneys' fees up to the time of the judgment.

VIII.

The Trial Court's Disposition of the \$20,000 Paid by Former Defendants Was Erroneous.

Plaintiffs in the final section of their brief in effect rely entirely on Judge Tolin's opinion itself as a reason for the correctness of the court's ruling. The decision of Judge Carter in the *Winckler* case adds nothing. As a matter of comity he quite naturally followed Judge Tolin's earlier ruling, and the *Winckler* case is now on appeal before this Court.

We have argued that (making the violent assumption that plaintiffs were damaged by the conspiracy in the amount of the jury's verdict), immediately plaintiffs received the \$20,000, they no longer had a cause of action for \$50,000, but only for \$30,000.

To avoid confusing the jury with the problem of treble damages and the effect of the prior payment, the disposition of the \$20,000 was left to the trial court by stipulation (Op. Br., p. 138). The trial court accepted the jury's figure of \$50,000, trebled it, and *then* deducted the \$20,000. It seems clear that what the court did thereby was to force Flintkote to add \$40,000 to the amount the former defendants had paid in mitigation of the damages before the trial commenced. Certainly if any question of "unjust enrichment" is involved here, it is the plaintiffs who have received the undeserved windfall. As the *Claybaugh* case points out, the function of the jury is only to render a judgment for actual damages and the court then triples them. Here, by stipulation, the court was to deal with the matter as if the evidence of the payment of the \$20,000 had been offered to the jury. If this matter had been submitted to the jury, the jury would have been obliged to deduct the prior payment of \$20,000 from their \$50,000 award, and the net verdict necessarily would have been \$30,000. Then, and only then, would the court's function of trebling the damages operate. The judgment, therefore, exclusive of attorney's fees and costs, should have been for \$90,000, instead of \$130,000.

IX.

Conclusion.

This brief has been devoted almost entirely to replying to the assertions of plaintiffs. Flintkote's points and arguments were fully presented in its opening brief and have not been restated here. Plaintiffs have not pointed out anything which militates against or weakens Flintkote's position. It is submitted, therefore, that the judgment should be reversed and the cause remanded with instructions to enter judgment for Flintkote, or, at least, for a new trial.

Respectfully submitted,

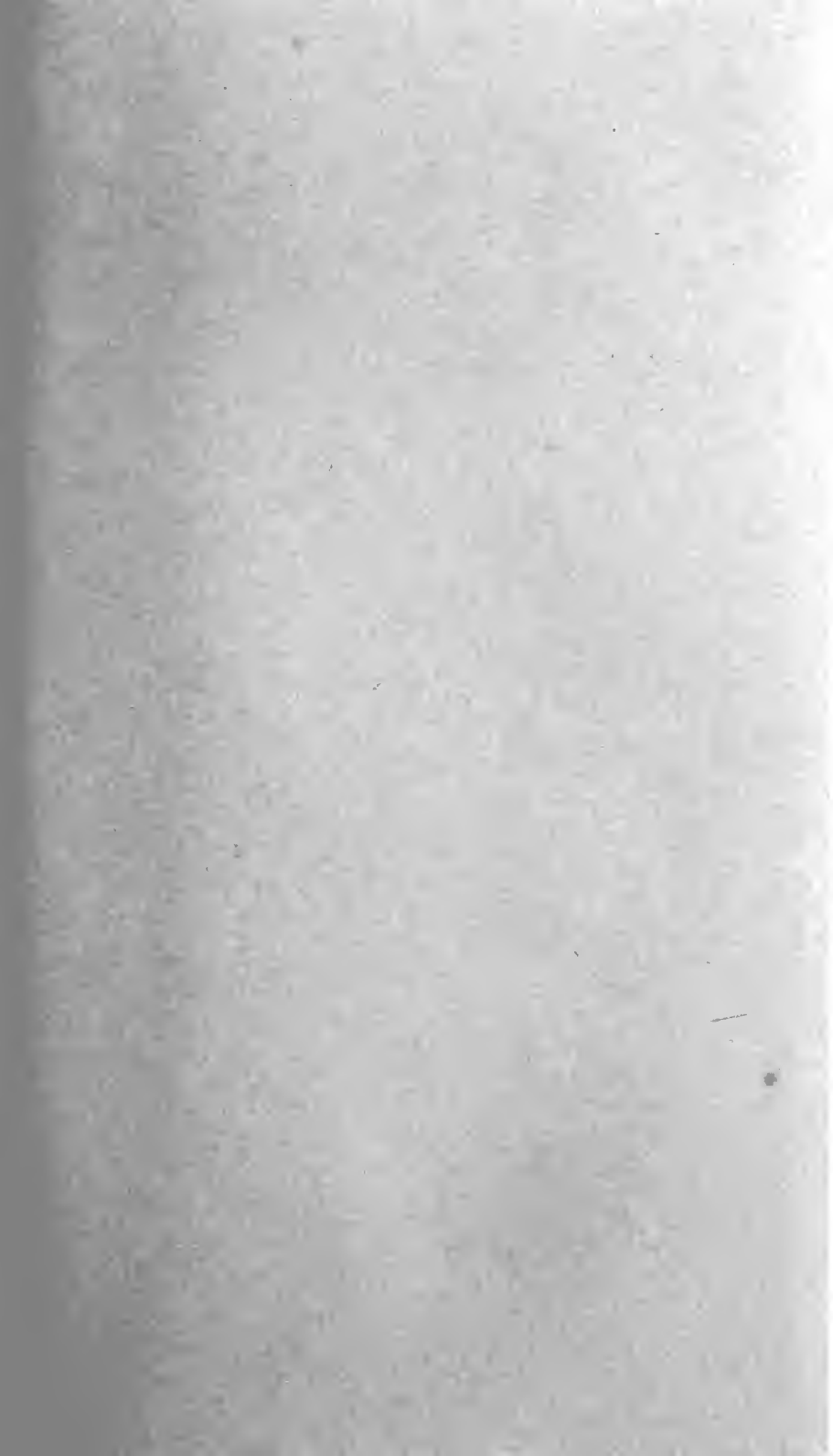
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APPENDIX.

Plaintiffs' "Statement of the Case" Is Distorted and Misleading.

At page 2, the following definition appears: " 'Contractor Defendants' or 'defendant contractors' shall refer to all other named co-conspirators." The definition is patently unfair: it proceeds on the assumption that all persons named in the First Amended Complaint were conspirators and that Flintkote conspired with them. It is conceded that evidence was received which might be construed as showing that the Downer Company conspired with other acoustical contractors to allocate jobs. However, the evidence does not compel that conclusion; and one of Flintkote's principal contentions on this appeal is that there is no evidence which would support a finding that Flintkote conspired with any contractors or at all. There is no reason to refer to the contractors as "defendants" except to place them in the same artificial category as Flintkote. The definition seems to assume that "defendant" is some sort of natural category or special characteristic of these contractors which is necessary properly to identify them. Certainly the fact that plaintiffs sued those persons and entities as well as Flintkote proves nothing, adds nothing to the description "contractors," and in no way advances any interests of clarity. Flintkote objected to characterizing the contractors as "defendants" in the instructions and during the trial; it has objected to such characterization in the trial court by this appeal; it objects to such characterization in connection with any statement of the case in any brief.

In addition to being an unfair and unwarranted description, the term is unfairly and inaccurately used in the brief. At page 15, plaintiffs refer to "numerous meetings [of Flintkote employees] with the contractor defendants at which appellees' competition with them was dis-

cussed.” The evidence is that Flintkote employees called on the contractors who handled Flintkote tile at their offices and that there were telephone communications between said Flintkote contractors and Flintkote. There was no reference in the evidence to any meeting between any Flintkote representative and any contractor who did not handle Flintkote products. The quoted sentence is thus both erroneous and misleading.

At page 3, plaintiffs state that Flintkote “sells and consigns [acoustical tile] directly to the defendant contractors . . .” This statement is misleading in that Flintkote sells to some but not all of the contractors named in the First Amended Complaint, and plaintiffs recognize this in later portions of their brief (*e.g.*, p. 8).

Throughout plaintiffs’ statement of the case, they ignore the plain fact that Flintkote had no contacts whatsoever with any acoustical contractor other than those to whom Flintkote sold acoustical tile. Plaintiffs seek to obscure this fact by the use of unwarranted generic terms to describe the Flintkote contractors, *e.g.*, “competitors of appellees” (p. 19, line 34; p. 22, lines 19 and 35; p. 23, line 8; p. 24, lines 31-32; p. 25, lines 12, 23 and 28; p. 26, line 13; p. 31, lines 17, 22, 27; p. 32, lines 3 and 31; p. 33, line 25), “Flintkote’s co-conspirators” and “Flintkote’s co-conspirator contractors” (p. 33), “its co-defendants” (p. 32). Obfuscation must have been the objective of such persistent misdescription.

Beginning on line 12, page 3, plaintiffs state: “Manufacturers do not place geographical limitations on their distributor outlets [R. 934; Ex. 11].” The citations do not support the statement. At page 934 of the Record, Ragland said that the territories of the Flintkote Los Angeles contractors were not limited. Exhibit 11 stated that Flintkote had recently placed its acoustical tile line in San Bernardino and Riverside with plaintiffs. Neither of those references support the broad allegation of the quoted

statement. The statement is not otherwise supportable by the Record, either as respects Flintkote policies or, in any event, as respects the policies of any manufacturer other than Flintkote.

Beginning near the bottom of page 19, plaintiffs state: ". . . Harkins, . . . was also meeting and conversing with these same competitors. He personally called the defendant Newport and asked him to lunch . . . to discuss appellees' competition". At the middle of page 21: ". . . at the same time Mr. Harkins met and obviously connived with Newport . . ." At the bottom of page 21: "Harkins, after personally conferring with appellees' competitors . . ." Each of the foregoing is a gross misrepresentation of the facts. There is nothing in the record which even colorably supports those statements. There is no evidence that Harkins saw, conferred with, or mentioned plaintiffs to, any acoustical contractor other than Newport, so the use of the plural form in the above quotations is patently erroneous. Harkins said he asked Newport to lunch, and

"Before we left for the Brown Derby I told Mr. Newport that I had heard about this story that Krause had called in, and so forth. I said, 'I want to make it perfectly clear to you that I am not going to discuss the matter of the Aabeta company with you now. I don't want you to discuss it with me. When a decision is made it will be based on the facts as we find them and it will be for our benefit, it will be for the good of The Flintkote Company.'"
(R. 1065-66.)

Harkins stubbornly stuck to this story throughout arduous cross-examination (R. 1091-93). There was no suggestion that Harkins' version of the luncheon was not entirely accurate. The use of the phrase "obviously connived" is not merely unwarranted but is contrary to the undisputed evidence.

Plaintiffs spend a not inconsiderable portion of their brief trying to establish the proposition that Flintkote's position that plaintiffs were not supposed to do business in Los Angeles was contrived for the purpose of obscuring the true nature of Flintkote's activities (*e.g.*, pp. 20, 21, 22, 25). Clearly there was a conflict between the testimony of plaintiffs and that of Flintkote's witnesses with respect to what the original understanding was, but the testimony of nine witnesses for Flintkote was uniformly to the effect that Flintkote at all times took the position that plaintiffs were not to do business in Los Angeles, and there is nothing even tending to show they ever deviated from that position.

There was also a conflict in the testimony as to whether Ragland knew of the existence of plaintiffs' Los Angeles office prior to his investigation of plaintiffs' activities at Mr. Harkins' request, but there is no evidence that any other Flintkote representative had such knowledge. The fact that the financial statement presented by plaintiffs bore the caption "aabeta co.—Los Angeles" is of no significance whatever. At that time the plaintiffs had no business address, and as they both had been operating in Los Angeles and both resided there, the legend on the document would be perfectly consistent with an intention to establish a business in San Bernardino. As a matter of fact, neither Harkins nor McAdow recalls having noted the item (R. 1105, 1121). The fact that the Ragland report (Ex. "I") contains some extraneous or irrelevant matters casts no doubt on its authenticity. Indeed, it tends to support its genuineness. It is just the sort of a report one might expect from a junior salesman in response to a commission "to find out if the various rumors we had heard were true" (R. 802). Had the report been contrived after the event, it seems clear that a more artistic job would have been done.

There is nothing in the testimony of Harkins, Thompson, Lewis, McAdow, Heller, Baymiller or Ragland that impugns the necessary conclusion therefrom that they honestly believed that the plaintiffs were not supposed to do business in Los Angeles. To assert the contrary requires one to contend that Harkins deliberately arranged for a fictitious report, caused it to be dated falsely, and that every Flintkote witness, as well as Krause and Howard, agreed on a false story, and that all gave deliberately perjured testimony on this subject at the trial. We say the only conclusion that could properly be drawn from the record in this case is that the Flintkote representatives acted entirely in good faith. There is no evidence to the contrary. A fact is proved by affirmative evidence, not by disbelief of a witness. (32 C. J. S., Evidence, §1045, p. 1134; *Moulton v. Moulton*, 227 N. W. 896 (Minn., 1929).) Yet, not only are plaintiffs willing to make the scandalous charge that all of the Flintkote witnesses got together on a deliberately fabricated story, but they are willing to say that this is the only possible conclusion the jury could draw from the testimony. Whether these reckless assertions could be excused as part of an argument is doubtful; they certainly have no legitimate place in what purports to be a statement of the facts.

The paragraph beginning at the bottom of page 22 and continuing through the middle of page 23 is also illustrative of the false, distorted, and misleading nature of plaintiffs' statement of the case. The references to "appellees' competitors" and "contractor defendants" obscure the plain fact that Flintkote had met with no one other than its own contractors. The statement that "in none of them [the meetings] did the contractor defendants state or admit that Flintkote took the position they now rely on" is false. Krause stated (R. 1125) that Lewis told him on the telephone that plaintiffs were to do business in San Bernardino and Riverside and not in Los Angeles.

Krause further stated (R. 1127) that Ragland told him “‘our agreement was for them to bid in San Bernardino and Riverside Counties only.’” Howard said (R. 1151) that “Some of the Pioneer-Flintkote people, either Mr. Heller or Mr. Baymiller”, had told him plaintiffs were restricted to the San Bernardino-Riverside area. Hoppe could not recall any discussion with Flintkote representatives (R. 1010). The characterization of Lewis, Thompson, Baymiller, and Ragland as “officers” is erroneous. None of them are or were officers of The Flintkote Company and there was no testimony by anyone that they were. “Privy Counsel” is plaintiffs’ idea and is not found in the testimony of anyone. Harkins did not state that he called a meeting at the time mentioned “for the alleged purpose of further discussing appellees’ position and the action to be taken by Flintkote with respect to the demands of appellees’ competitors”. At page 1070 of the Record, Harkins stated that the discussion among himself, Thompson and Baymiller was “to be positive that there had been no misunderstanding in my mind or in theirs as to the terms and conditions under which we were approving them as acoustical contractors in San Bernardino.” There is no suggestion in the record that “the demands of appellees’ competitors” were discussed, mentioned, or in any way entered into the consideration of the parties to that meeting. What the jury considered is, for the most part, immaterial to a statement of the case and, in any event, is pure speculation in this setting for such consideration is not necessary to the verdict returned. The statement that Flintkote had not contacted plaintiffs in any way to find out whether they were doing business in Los Angeles is false. Ragland testified that he had talked to Lysfjord in the course of investigating plaintiffs’ activities about whether plaintiffs were doing business in Los Angeles (R. 803-4, 923-24, Ex. I). There is no testimony that Ragland did not do so. It is thus apparent that no portion of the 15 lines just discussed is

true or bears any resemblance either to the facts or to the testimony which was elicited during the course of the trial.

At pages 23-25 plaintiffs attempt to demonstrate that Flintkote refused to sell to plaintiffs in return for a promise by the other contractors to buy more Flintkote tile. There was absolutely no evidence to support that contention; in fact the record affirmatively shows that the contention is false (Harkins, R. 1077, 1082; Krause, R. 1146). The statement that Acoustics, Inc. was substituted for Sound Control at or about the time plaintiffs were terminated is wrong. The two citations to the record are to statements that Sound Control was terminated "early" in 1952. At page 1009 of the Record, Hoppe said the termination was in "April or May". Exhibit "J" shows nothing about the date of termination, since the reason for such termination was that the Sound Control purchases were too small (R. 1009, 1044, 1078). The testimony was all to the effect that Acoustics was substituted for Sound Control, and any statement that Acoustics was substituted for plaintiffs is unwarranted and false. Acoustics, Inc. is characterized as "a relatively inexperienced newcomer in the acoustical contracting business" (pp. 24 and 26). The evidence is clear, however, that Acoustics had been in the acoustical tile contracting business since at least 1950, handling Fir-Tex tile, and was managed by an exceedingly capable and experienced man (R. 849-51). It is conceded that plaintiffs were competent and experienced workmen, but it is not conceded that they knew anything about or had any experience in connection with running a business: the evidence is that Waldron did not (R. 711-12) and there is no evidence that Lysfjord did. Obviously, then, any suggestion that plaintiffs, who were just getting started, were more experienced than Acoustics, which had been in the business for two years, or that Acoustics was

“relatively inexperienced” is wholly unfounded, false and misleading. The sentence at the bottom of page 24 and continuing on page 25 is one of the most gross misstatements in the brief. Exhibit “J”, it will be recalled, merely shows the purchases of Flintkote acoustical tile by the various Flintkote contractors in Los Angeles during certain years. It shows that the purchases were larger in 1952 than they were in 1951—and that is all it shows. Yet plaintiffs have the temerity to state:

“Finally, Exhibit J shows beyond doubt that commencing as soon as possible after Flintkote had agreed to and did accede to appellees’ competitors’ demands to eliminate appellees’ competition, the three other Flintkote dealers increased substantially their purchases of Flintkote tile [R. 1043-1044, 1075-1076].”

Such unfair and unwarranted distortion of the facts is inexcusable.

The numbered paragraphs on pages 25-26 characterized as “evidentiary highlights” are exceptionally objectionable. Almost every statement in the entire list is wholly or partly false.

“(1) Their admitted knowledge of the non-competitive nature of the industry as it existed in the Los Angeles area [R. 1086-1089];”

At pages 1086-1089 of the Record, Harkins testified that Flintkote tile was sold on a “split line” basis in Los Angeles, and why. There is no admission anywhere in the record that the industry in the Los Angeles area was non-competitive; nor is there any admission that Flintkote had any knowledge of the situation, if it existed. (The statements at pages 8 and 9 of appellees’ brief characterizing the manufacturers’ distribution systems in Los Angeles as monopolistic are similarly gratuitous.)

“(2) The objections of appellees’ competitors to any new competition in the area, including specifically that of appellees;”

The evidence is that the Flintkote contractors, and no one else, objected to plaintiffs’ doing business in Los Angeles.

“(3) The pertinent and admitted conniving as evidenced by the repeated and numerous conferences between Flintkote and appellees’ competitors for the obvious purpose of finding ways and means and excuses to destroy appellees’ competition;”

No “conniving” was ever admitted. Flintkote admits that certain Flintkote contractors objected to plaintiffs’ being set up by Flintkote in business in Los Angeles without prior notice. The evidence is uniformly to the effect that Flintkote advised all of the Flintkote contractors that plaintiffs were not supposed to be doing business in Los Angeles and that when Flintkote determined what the facts were it would determine what Flintkote’s best interests required. As an “evidentiary highlight,” the quoted statement is false, is contrary to all the evidence, and is supported by none.

“(4) The concoction by Flintkote of a wholly unnecessary and irrelevant written report in a futile attempt to obscure their knowing cooperation in the destruction of appellees’ acoustical tile business, their admitted destruction of same;”

There was no evidence that Ragland’s report was not genuine in all respects and the suggestion that it was not is scurrilous and unfounded. There is no admission that Flintkote destroyed plaintiffs’ business, and, on the contrary, plaintiffs’ own evidence is that the business continued profitably to the date of the trial.

“(5) The contradiction between the testimony of appellees and the defense witnesses;”

That statement, surprisingly enough, is true, at least as to some of the testimony, though what it proves in a contested lawsuit is not readily apparent.

“(6) The complete lack of any attempt by the defendants during the course of the trial and through the large number of contracting defendants called by Flintkote who were directly involved to inquire into or make any attempt to rebut or discredit the testimony of appellees and exhibits with regard to the bid allocation and price fixing scheme established against the contractor defendants, and finally, the undeniable fact that it was only after (a) appellant had investigated and approved appellees as Flintkote contractors and (b) thereafter at the behest of appellees’ competitors, Flintkote admittedly destroyed appellees’ acoustical tile business by taking away its sole supply of tile and almost immediately giving it to Acoustics, Inc., a relatively inexperienced competitor of appellees and a member of defendant Association.”

Flintkote called three contractors to testify. These were the only ones with whom Flintkote had had any dealings. It made as much attempt as could be made through those witnesses to disprove any conspiracy among the contractors. Each of the contractors called by Flintkote denied that there was or ever had been any conspiracy among the contractors to fix prices or allocate jobs (Hoppe, R. 1012; Krause, R. 1131; Howard, R. 1152). It is not an “undeniable fact” that Flintkote gave a blanket approval to plaintiffs as Flintkote contractors; all of Flintkote’s testimony denied that and was to the effect that plaintiffs were approved as Flintkote contractors in Riverside and San Bernardino. It is not an “undeniable fact” that Flintkote did anything “at the behest of appellees’ competitors”; and all of the direct testimony was that Flintkote acted independently and at the behest

of no one. Flintkote, as above noted, never admitted that it destroyed plaintiffs' business or that plaintiffs' business was destroyed by anyone or at all. The statement that Flintkote took away plaintiffs' supply of tile and gave it to Acoustics is false and contrary to all the evidence. The suggestion that Acoustics was "relatively inexperienced" is false, at least in relation to plaintiffs. It is true that Acoustics was a member of the Association, but there is no suggestion anywhere in the evidence that membership in the Association had any relationship to Acoustics being chosen to replace Sound Control.

Even the statement of "Evidence on Damages" (App. Br., pp. 26-28) contains many misstatements and inaccuracies.

The record shows that plaintiffs paid not 17% to 20% but exactly 16.066% more for acoustical tile than they would have paid Flintkote for comparable items during the entire period to the time of trial (R. 1195).

The flat assertion that "appellees were unable to bid for acoustical tile jobs of any consequence, because of their lack of an assured source of supply of A. M. A. approved tile" is a gross overstatement of the evidence. The only statement in the record that any work at all was lost was ". . . we would lose the job, *because we were overpriced*. That happened." (Waldron, R. 274.) No specific instance was referred to. Lysfjord related a \$60,000 or \$70,000 job on which plaintiffs' bid was only \$200 to \$400 higher than the successful bidder, despite a mark-up of 50% above cost (R. 677). To make that bid plaintiffs admit they had an assured source of supply (R. 1212).

From plaintiffs' own books it was demonstrated that for the entire period up to the time of trial plaintiffs paid \$9,240.82 more for acoustical tile than they would have paid at Flintkote prices (R. 1195)—not \$12,758.57 as

plaintiffs state. The “conflict” was not in “opinion evidence”. Plaintiffs’ exhibits 38 and 39 were demonstrated to be inaccurate (R. 591, 592, 665-68, 702-03), but plaintiffs refused to correct them. Flintkote had to get the correct figures from plaintiffs’ books and records.

As to the speculation by plaintiffs on how many carloads they expected to sell per month in operating their own business, plaintiffs make the amazing statement that “their opinion as to anticipated growth of their own venture” was not “seriously disputed or attacked during the course of trial.” We assure this Court that our objections to that testimony offered repeatedly during the trial were entirely serious. (See Specification of Error No. 13 and pages 34-42, 110-114 of our Opening Brief.)

No. 15005.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

THE FLINTKOTE COMPANY, a corporation,

Appellant,

vs.

ELMER LYSEJORD and WALTER R. WALDRON, doing business as aabeta co.,

Appellees.

Petition for Attorney's Fees on Appeal and Affidavit
in Support Thereof.

FILED

JUL 17 1956

PAUL P. O'BRIEN, CLERK

ALFRED C. ACKERSON,

417 South Hill Street,

Los Angeles 13, California,

Attorney for Petitioners and Appellees.



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No. 15005.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

THE FLINTKOTE COMPANY, a corporation,

Appellant,

vs.

ELMER LYSFJORD and WALTER R. WALDRON, doing business as aabeta co.,

Appellees.

Petition for Attorney's Fees on Appeal and Affidavit in Support Thereof.

This petition by plaintiffs (appellees herein) is filed simultaneously with the filing of their brief as appellees.

The Sherman Act provides for attorney's fees to a successful plaintiff. The trial court awarded \$25,000 to cover attorney's fees to the end of the trial. Attorney's fees for this appeal should be awarded by this Court.

American Can Co. v. Bruce's Juices, Inc., 190 F. 2d 73, 74;

Laufenberg, Inc. v. Goldblatt Bros., Inc., 187 F. 2d 823, 825;

Jerome v. 20th Century-Fox Film Corporation, 165 F. 2d 784, 785;

American Crystal Sugar Co. v. Mandeville Island Farms, Inc. (C. C. A. 9th), No. 12946—this Court.

This petition is based upon the record and briefs on file herein and upon the affidavit of Alfred C. Ackerson attached hereto and made a part hereof.

Wherefore, petitioner prays for attorney's fees for this appeal in the sum of \$13,000.

Respectfully submitted,

ALFRED C. ACKERSON,
Attorney for Petitioners and Appellees.

**Affidavit in Support of Petition for Attorney's Fees
on Appeal.**

STATE OF CALIFORNIA)
) ss.
COUNTY OF LOS ANGELES)

ALFRED C. ACKERSON, being duly sworn, deposes and
says:

Appellees herein simultaneously with the filing of their
brief as appellees filed their Petition for Attorney's Fees
on Appeal wherein it was pointed out that the Sherman
Act provides for attorney's fees to a successful plaintiff;
that the Court awarded \$25,000 to cover attorney's fees
to the end of the proceedings in the trial court [R. 125];
that attorney's fees for this appeal should be awarded by
the Court; that until final argument in this appeal appel-
lees will not know the full extent of such services, and
that the full extent of such services will be presented to
the Court by Affidavit at that time providing the said
services vary substantially from the following actual and
estimated time expended and to be expended.

However, in order to give appellant an opportunity to
check the figures herein presented and to reply prior to
the time of oral argument, we serve and file this affidavit
at the present time.

Affiant at all times during the progress of this litigation
was, and now is, an attorney at law duly admitted to prac-
tice before the District Courts of the United States, in
and for the Southern District of California, and in numer-
ous other District Courts throughout the United States,
the Court of Appeals for the Ninth Circuit, the Supreme
Court of the United States, all of the state courts of Cali-
fornia, and the District and Appellate Courts of the Dis-
trict of Columbia.

Your affiant has been engaged in the practice of prosecuting and defending antitrust cases and related cases since in or about the year 1934.

Affiant has handled this cause of action on behalf of plaintiffs below from the original investigation of the facts prior to the filing of suit through the trial of the case.

The firm of attorneys representing appellant is a large, distinguished, experienced and able law firm.

The appellate record herein is extensive, and since appellant's Notice of Appeal its counsel have found it necessary to request of and receive from this Court an extension of time in which to file their Opening Brief and have found it necessary or expedient to obtain special permission from this Court to file a brief in excess of the number of pages permitted by the rules of this Court. Appellant's Opening Brief pursuant to permission of this Court contains 144 pages. The length of appellant's said Brief, manner in which the questions are posed therein, and the length of the appellate record have caused affiant to spend in excess of 350 hours in connection with this appeal and the matters involved therein since the entry of judgment and to and including the date of this affidavit, and affiant expects to spend and will be required to spend further time in preparing for argument and in arguing this appeal. Affiant has office records kept in the usual course of business showing the time spent in this appeal and such records are open to the inspection of counsel for appellant or their accountants at any reasonable time or times prior to the oral argument for the purpose of permitting appellant to check such time records.

Affiant's usual and regular charge for his services for matters of this kind are regularly based upon a minimum of \$35 per hour. Affiant recognizes that the time involved

is but one of the elements to be considered in the evaluation of an attorney's fee.

Affiant is familiar with the elements recognized in determining proper and reasonable attorney's fees by this Court (*Sampsell v. Monell*, 162 F. 2d 4, 6), and by the general, Federal, and State authorities on the subject.

Giving due consideration to each of the elements recognized by the above authorities in determining proper and reasonable attorney's fees, it is the studied opinion of affiant that the reasonable value of affiant's services in connection with this appeal, including the time that should be reasonably necessary to prepare for argument and appearance on oral argument and argument of this cause on oral argument is \$13,000.

WHEREFORE, affiant prays that this Court award appellees the sum of \$13,000 as attorney's fees on this appeal.

ALFRED C. ACKERSON

Subscribed and sworn to before me this 16th day of July, 1956.

JOYCE B. BALDWIN,
*Notary Public in and for
the County of Los Angeles,
State of California.*

[Notarial Seal]



No. 15006

**United States
Court of Appeals**
for the Ninth Circuit

JOHN FOSTER DULLES, as Secretary of State,
Appellant,

VS.

QUAN YOKE FONG,
Appellee.

Transcript of Record

Appeal from the United States District Court for the
Southern District of California,
Central Division.

FILED

MAY - 7 1956

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.-4-27-56

PAUL P. O'BRIEN, CLERK

No. 15006

**United States
Court of Appeals**
for the Ninth Circuit

JOHN FOSTER DULLES, as Secretary of State,
Appellant,
vs.

QUAN YOKE FONG,
Appellee.

Transcript of Record

**Appeal from the United States District Court for the
Southern District of California,
Central Division.**



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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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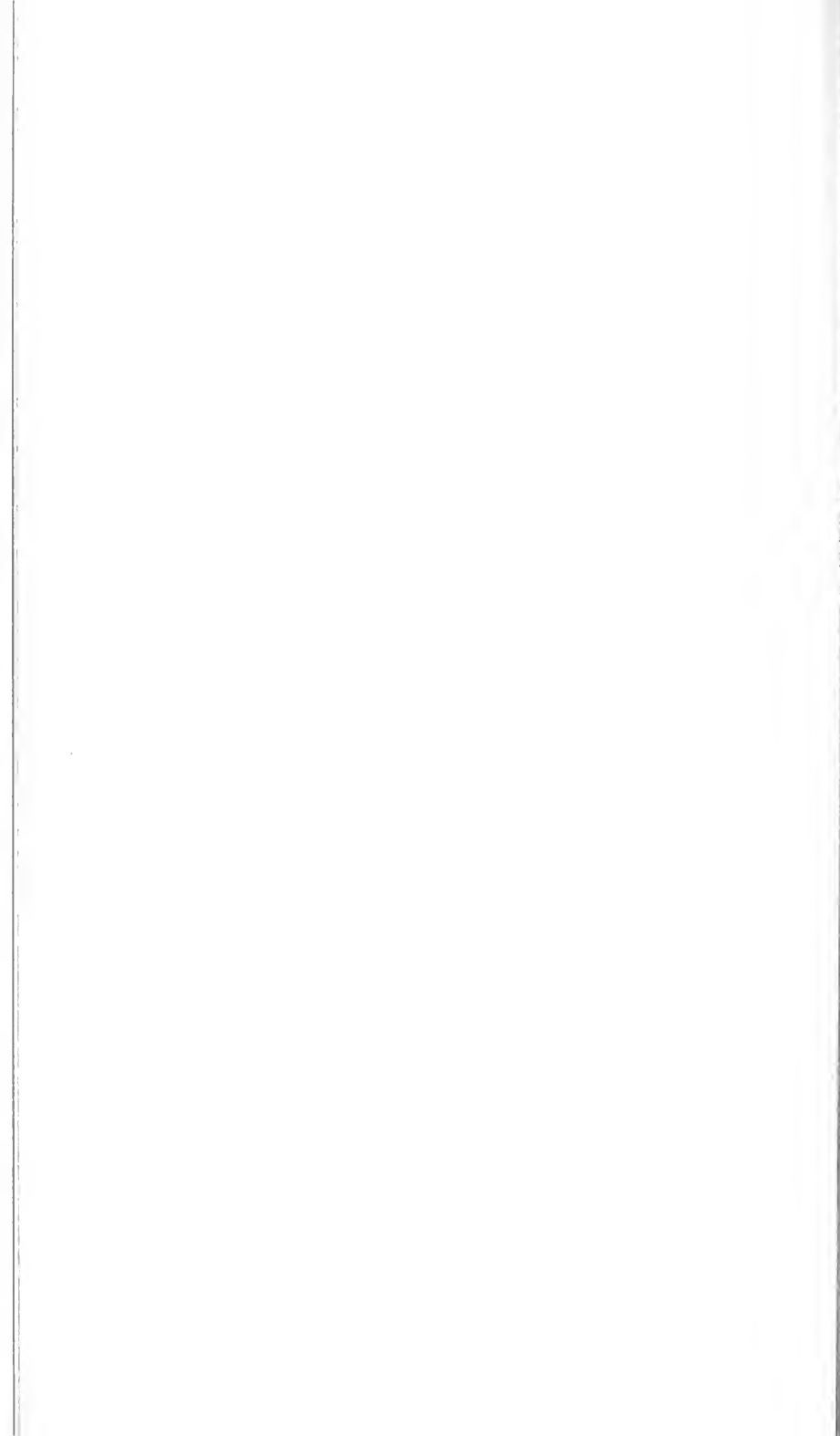
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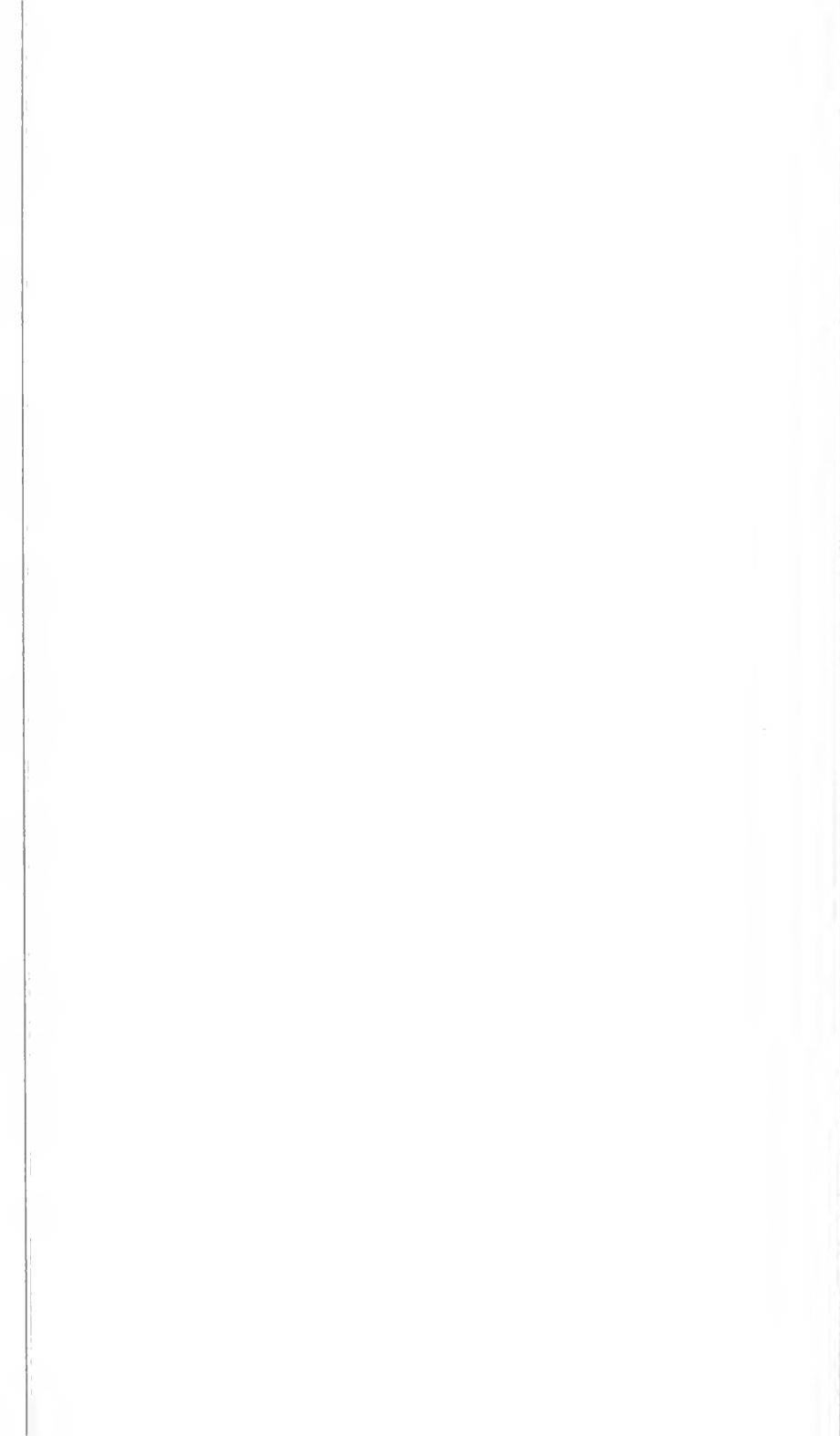
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In the District Court of the United States in and
for the Southern District of California, Central
Division

No. 14963-T

QUAN YOKE FONG,

Plaintiff,

vs.

DEAN ACHESON, as United States Secretary of
State,

Defendant.

PETITION TO ESTABLISH NATIONALITY
OF THE UNITED STATES PURSUANT
TO SECTION 903, TITLE 8, U.S.C.A.

Comes now the plaintiff above named, and for
cause of action alleges as follows:

I.

That plaintiff was born on February 13, 1930
(CR 19-1-15) at Kowkwong City, Kwangtung,
China.

II.

That plaintiff is the son of Quan Lun Hong, also
known as Tommy Quan, a citizen of the United
States, now residing in Los Angeles, California; that
said Quan Lun Hong, also known as Tommy Quan,
was married to Gee Bo Yoke, in Ping On Village,
Kowkwong, China, on or about July 29, 1921
(CR 10-6-25); that plaintiff is the lawful issue of
said marriage; that Quan Lun Hong, also known
as [2*] Tommy Quan, was a citizen of the United

*Page numbering appearing at foot of page of original Certified
Transcript of Record.

States at the time of plaintiff's birth and has lived and resided in the United States since May, 1915, at which time said Quan Lun Hong, also known as Tommy Quan, was admitted to the United States by the United States Immigration and Naturalization Service as a citizen of the United States; that plaintiff's father, Quan Lun Hong, also known as Tommy Quan, resides in the City of Los Angeles, County of Los Angeles, State of California; that plaintiff claims residence in said City of Los Angeles, State of California, the home of plaintiff's father and in the jurisdiction of this Court; that because of his birth as above alleged, plaintiff claims to be a citizen of the United States pursuant to Section 1993, Revised Statutes of the United States, and entitled to the rights and privileges of a citizen of the United States, including the right to enter and remain in the United States as a citizen thereof.

III.

That plaintiff heretofore filed an application for an American passport or other travel document as a citizen of the United States with the American Consulate General at Hong Kong, China, an agency of the United States State Department, and under the jurisdiction, management and direction of defendant, Dean Acheson, Secretary of State of the United States, for the purpose of traveling to the United States to join his father, Quan Lun Hong, also known as Tommy Quan, at the family home provided by his said father in Los Angeles, California; that the American Consulate General at Hong

ong has refused to issue to plaintiff the passport applied for, thereby denying plaintiff's American citizenship and his rights and privileges as a citizen of the United States.

IV.

That plaintiff has at all times herein mentioned claimed [3] and now claims the right and privilege as a national of the United States of America to enter, stay and remain and reside permanently in the United States as a citizen thereof, but that the said defendant has denied and continues to deny such rights and privileges to the plaintiff upon the ground that he is not a national of the United States.

V.

That plaintiff having been denied his rights as herein above alleged, now brings this action in good faith pursuant to the provisions of Section 903, Title 8, U.S.C.A., also known as Section 503 of the Nationality Act of 1940.

Wherefore, plaintiff respectfully prays that judgment of this Honorable Court be entered declaring him to be a national of the United States and entitled to the rights and privileges of a citizen of the United States, and for such other and further relief as to the Court may seem just and proper.

/s/ KATHLEEN PARKER,
Attorney for Plaintiff.

[Endorsed]: Filed December 23, 1952. [4]

[Title of District Court and Cause.]

ANSWER

Comes Now the defendant, Dean Acheson, a United States Secretary of State, by and through his attorneys, Walter S. Binns, United States Attorney for the Southern District of California, Clyde C. Downing and Leila F. Bulgrin, Assistant United States Attorney for the Southern District of California, and in answer to plaintiff's petition on file herein, admits, denies and alleges as follows:

I.

Answering Paragraph 1, the defendant alleges he is without knowledge or information sufficient to form a belief as to the truth or falsity of the allegations contained in said Paragraph, and therefore denies generally and specifically every part thereof.

II.

Answering Paragraph II, the defendant denies that Quan Lun Hong, also known as Tommy Quar, was at any time a citizen of the United States, or that he was admitted to the United States at any time as a citizen by the United States [5] Immigration and Naturalization Service.

Further answering Paragraph II, the defendant alleges that he is without knowledge or information sufficient to form a belief as to the truth or falsity of all other allegations contained in said Paragraph and therefore denies generally and specifically the same and every part thereof.

III.

Answering Paragraphs III, IV and V, the defendant denies generally and specifically each and every allegation contained therein.

Further answering said Paragraphs, defendant denies that the plaintiff is, or ever has been, a citizen of the United States, or entitled to any rights or privileges as such.

For a Further, Second and Separate Defense to Plaintiff's Petition, Defendant Alleges:

I.

The petition of plaintiff herein fails to state a claim upon which relief can be granted.

Wherefore, defendant prays for a judgment dismissing said petition and denying the relief prayed for therein.

WALTER S. BINNS,
United States Attorney;

CLYDE C. DOWNING,
Assistant U. S. Attorney,
Chief of Civil Division;

/s/ LEILA F. BULGRIN,
Assistant U. S. Attorney,
Attorneys for Defendant.

Affidavit of Service by Mail Attached.

[Endorsed]: Filed April 8, 1953. [6]

[Title of District Court and Cause.]

MINUTES OF THE COURT

MARCH 21, 1955

Young John, et al. vs. John Foster Dulles, etc.—

No. 13,690-HW Civil.

Chin Wah Ben, et al. vs. John Foster Dulles, etc.—

No. 14,820-HW Civil.

Lee Suie Wah vs. John Foster Dulles, etc.—

No. 14,962-HW Civil.

Quan Yoke Fong vs. John Foster Dulles, etc.—

No. 14,963-HW Civil.

Joy Fook Look vs. John Foster Dulles, etc.—

No. 14,972-HW Civil.

Hom Ing Chuey vs. John Foster Dulles, etc.—

No. 14,975-HW Civil.

Lew Yook Kong vs. John Foster Dulles, etc.—

No. 15,003-HW Civil.

Fong Nai Lap vs. John Foster Dulles, etc.—

No. 15,005-HW Civil.

Chan Wah Bok, etc., vs. John Foster Dulles, etc.—

No. 15,006-HW Civil.

Hon. Harry C. Westover, District Judge.

Proceedings:

For further proceedings. (Same order in each case):

It Is Ordered that cause is continued to July 11, 1955, 10 a.m., for setting for trial.

EDMUND L. SMITH,

Clerk. [7]

Title of District Court and Cause.]

MOTION TO REQUIRE PARTIES TO FURNISH BLOOD SAMPLE AND UNDERGO BLOOD TESTS

Defendant moves the Court, as authorized by Rule 5 of the Federal Rules of Civil Procedure, for an order requiring Quan Yoke Fong, plaintiff in the above-entitled action, to appear at Hong Kong, S.C.C., at such time and place or places and to such physician or other persons to be designated by the court, and there to furnish and permit such physician or other persons to take a sample or samples of his blood in sufficient quantities so that such blood may be transported to the United States of America and there be examined and tested by a physician, hematologist, serologist, or other person for blood grouping and type;

Defendant further moves the Court for an Order requiring Quan Lun Hong and Gee Bo Yoke, alleged father and mother respectively, of plaintiff, to appear at Los Angeles, California, at such time and place or places and to such physician or other persons to be designated by the Court, and there to have their blood tested by said physician or other persons for blood grouping and type; and that defendant have such other, further, and different relief as may be proper.

This Motion is based upon and will be presented upon the Affidavit of James R. Dooley annexed hereto, these Motion papers and Memorandum of

Points and Authorities in Support Thereof, together with all of the pleadings, papers, records and documents on file herein.

Dated: This 6th day of May, 1955.

LAUGHLIN E. WATERS,
U. S. Attorney;

MAX F. DEUTZ,
Asst. U. S. Attorney,
Chief of Civil Division;

/s/ JAMES R. DOOLEY,
Assistant U. S. Attorney,
Attorneys for Defendant.

AFFIDAVIT IN SUPPORT OF MOTION TO
REQUIRE PARTIES TO FURNISH
BLOOD SAMPLE AND UNDERGO BLOOD
TESTS

United States of America,
Southern District of California—ss.

James R. Dooley, being first duly sworn, deposes and says:

1. That he is an Assistant United States Attorney for the Southern District of California, and one of the attorneys for the defendant in the above-entitled cause;

2. That said cause is an action for declaration of nationality under Section 503 of the Nationality Act of 1940, 54 Stat. 1171, 8 U.S.C.A. Section 903;

3. That the physical condition of the plaintiff and that of his alleged parents is in controversy in the above-entitled cause, since records in possession of defendant show and defendant contends that the blood group of plaintiff is incompatible with that of his alleged parents;

4. That this Court should order plaintiff to furnish a sample or samples of his blood, and should further order plaintiff's alleged parents to have their blood tested, for the reason that evidence of whether said plaintiff's blood is compatible with that of his alleged parents is essential to a determination of plaintiff's claim to nationality of the United States; since said plaintiff acquired citizenship, if at all, through his alleged father by virtue of Section 1993 of the Revised Statutes of the United States as amended.

5. That upon information and belief plaintiff is now residing in Hong Kong, B.C.C., the Secretary of State having refused to furnish said plaintiff a certificate of identity to travel to the United States pursuant to the discretion conferred upon said Secretary [11] by Section 503 of the Nationality Act of 1940; and that said plaintiff will not be permitted to travel to the United States prior to the trial of this cause.

6. That upon information and belief, the alleged parents of plaintiff are now residing within the Southern District of California, Central Division, and within the jurisdiction of this Court.

/s/ JAMES R. DOOLEY.

Subscribed and sworn to before me this 6th day
May, 1955.

[Seal] EDMUND L. SMITH,
Clerk, U. S. District Court, Southern District of
California.

By /s/ CHARLES E. JONES,
Deputy. [12]

* * *

A proposed Order setting forth suggested details
of obtaining a sample or samples of plaintiff's blood
and transporting it to the United States for exami-
nation and testing, and setting forth details con-
cerning the blood testing of plaintiff's alleged par-
ents will be presented to the Court when this Mo-
tion comes on for hearing.

Respectfully submitted,

LAUGHLIN E. WATERS,
United States Attorney;

MAX F. DEUTZ,
Assistant U. S. Attorney,
Chief of Civil Division;

/s/ JAMES R. DOOLEY,
Assistant U. S. Attorney,
Attorneys for Defendant.

Affidavit of Service by Mail Attached.

[Endorsed]: Filed May 6, 1955. [13]

[Title of District Court and Cause.]

MOTION TO DISMISS

Defendant above named, by and through the undersigned, moves the Court to dismiss the within-action pursuant to Rule 12(b) (1) (6) and Rule 2(h), Federal Rules of Civil Procedure, on the following grounds:

1. This Court lacks jurisdiction over the subject matter of the instant action.
2. The Complaint on file herein fails to state a claim upon which relief can be granted.

This Motion is based upon, and will be presented upon, the affidavit of James R. Dooley, attached hereto as Exhibit A, the certified passport file of Quan Yoke Fong, which will be offered in evidence when this Motion comes on for hearing, a certified statement prepared by the Department of State concerning the processing of applications in Hong Kong, B.C.C., which will be offered in evidence when this Motion comes on for hearing, these Motion papers and Memorandum of Points and Authorities in Support thereof, together with all the records, files, pleadings, papers and documents on file herein.

Dated: This 6th day of May, 1955.

LAUGHLIN E. WATERS,
United States Attorney;

MAX F. DEUTZ,

Assistant U. S. Attorney,
Chief of Civil Division;

/s/ JAMES R. DOOLEY,

Assistant U. S. Attorney,
Attorneys for Defendant.

EXHIBIT A

Affidavit of James R. Dooley

United States of America,
Southern District of California—ss.

James R. Dooley, being first duly sworn, deposes and says:

1. That he is an Assistant United States Attorney in the office of Laughlin E. Waters, United States Attorney for the Southern District of California, and as such is in charge of the files in said office pertaining to the above-captioned matter.

2. That among the aforementioned files of which affiant is in charge are certain documents, duly certified under seal of the Department of State constituting the passport file in the case of Quan Yoke Fong, plaintiff herein.

3. That said passport file in the case of Quan Yoke Fong discloses the following:

a. That on May 13, 1952, plaintiff executed an application for passport before Frank J. Haughey, Vice Consul of the United States at Hong Kong,

B.C.C., in which he claimed to be a citizen of the United States, and in which he sought a passport to travel to the United States.

b. That on November 5, 1952, William A. Mucci, American Vice Consul at Hong Kong, B.C.C., recommended that the Department of State disapprove plaintiff's application for passport, and that on the same date said recommendation was concurred in by H. E. Montamat, American Consul.

c. That by Cable No. A-463, dated January 6, 1953, the Passport Office, Department of State, instructed the American Consulate General, Hong Kong, B.C.C., that the passport application of plaintiff was disapproved.

d. That said passport file does not show a disapproval of [21] plaintiff's application for passport prior to January 6, 1953.

/s/ JAMES R. DOOLEY.

Subscribed and sworn to before me, this 6th day of May, 1955.

[Seal] EDMUND L. SMITH,
Clerk, U. S. District Court, Southern District of
California,

By /s/ CHARLES E. JONES,
Deputy.

Affidavit of Service by Mail Attached.

[Endorsed]: Filed May 6, 1955. [22]

[Title of District Court and Cause.]

MINUTES OF THE COURT
MAY 16, 1955

Hon. Harry C. Westover, District Judge.

Proceedings:

For hearing (1) motion of defendant, filed May 6, 1955, to dismiss; (2) motion of defendant, filed May 6, 1955, to require the parties to furnish samples of their blood and undergo blood tests.

Attorney Dooley argues in support of said motions.

Attorney Parker makes a statement.

Court Orders motion (1) of defendant to dismiss Denied.

Deft's Ex. A and B are admitted in evidence.

Court Orders motion (2) of defendant Granted

It Is Ordered that trial is set for May 31, 1955
10 a.m.

EDMUND L. SMITH,
Clerk. [24]

[Title of District Court and Cause.]

ORDER REQUIRING PARTIES TO FURNISH
BLOOD SAMPLE AND UNDERGO BLOOD
TESTS

The above-entitled matter came on for hearing upon defendant's Motion to Require Parties to Fur

ish Blood Sample and Undergo Blood Tests on May 16, 1955, in the above-entitled Court before the Honorable Harry C. Westover, Judge Presiding, the plaintiff being represented by his attorney, Kathleen Parker, and the defendant being represented by his attorneys, Laughlin E. Waters, United States Attorney; Max F. Deutz and James R. Dooley, Assistant United States Attorneys, by James R. Dooley; and the Court having considered defendant's Motion, the Affidavit of James R. Dooley annexed thereto, together with all of the pleadings, papers, records, documents and proceedings in this cause; and it appearing to the Court that plaintiff should be required to furnish a sample or samples of his blood and that the alleged parents of plaintiff should be required to undergo blood tests, since evidence of whether plaintiff's blood is compatible with that of his alleged parents is essential to a determination of his claim to nationality of the [25] United States; and it appearing to the Court that plaintiff is now residing in Hong Kong, B.C.C., and that plaintiff will not be able to travel to the United States prior to the trial of this cause; and it further appearing to the Court that plaintiff's alleged parents are now residing within the Southern District of California, Central Division, and within the jurisdiction of this Court, and good cause appearing therefor;

Now, Therefore, It Is Ordered:

1. That plaintiff, Quan Yoke Fong, present himself on the 9th day of June, 1955, at 10:00 o'clock

a.m., at the office of the American Consulate General, 580 Garden Road, Hong Kong, B.C.C., where he will be directed to the office of Dr. L. T. Ride Vice Chancellor, Hong Kong University, and there to furnish and permit said doctor to take a sample or samples of his blood in sufficient quantities so that such blood may be transported to the West Coast Medical Laboratories, 610 South Broadway, Los Angeles, California, for examination and testing for blood grouping and type; and that plaintiff identify himself at the time a sample or samples of his blood is taken by acknowledging in writing that he has presented himself as ordered by this Court.

2. That in the event plaintiff has not received notice of this Order by the 9th day of June, 1955, that plaintiff then present himself at the time and place as aforesaid on the 16th day of June, 1955.

3. That Quan Lun Hong and Gee Bo Yoke, alleged father and mother, respectively, of plaintiff, present themselves on the 9th day of June, 1955, at 10:00 o'clock a.m., at West Coast Medical Laboratories, 610 South Broadway, Suite 713, Los Angeles, California, and there to permit Albert L. Blifeld, a clinical laboratory technician licensed by the State of California, or other qualified official, agent, or employee of said laboratories, to test their blood for grouping and/or type; and that the alleged parents of [26] plaintiff identify themselves at the time of such testing by furnishing their names and ad-

resses and by acknowledging in writing that they are presenting themselves pursuant to this Order.

4. That counsel for plaintiff notify plaintiff and his alleged parents of the contents of this Order with all possible dispatch and request that plaintiff and his alleged parents present themselves at the respective times and places as aforesaid.

5. That counsel for defendant send a copy of this order to the American Consulate General, Hong Kong, B.C.C., and request that a copy of said Order be served upon the plaintiff by a consular official.

Dated: This 10th day of May, 1955.

/s/ HARRY C. WESTOVER,
Judge, U. S. District Court.

Approved as to form:

/s/ KATHLEEN PARKER,
Attorney for Plaintiff.

LAUGHLIN E. WATERS,
United States Attorney;

MAX F. DEUTZ,
Assistant U. S. Attorney,
Chief, Civil Division;

/s/ JAMES R. DOOLEY,
Assistant U. S. Attorney,
Attorneys for Defendant.

[Endorsed]: Filed May 17, 1955. [27]

quence, affiant was unable to test this blood sample for blood grouping or type.

4. That affiant has recently examined several blood samples shipped from Hong Kong, B.C.C., and in all cases except the sample mentioned above and a sample in the case of Young John, has found the blood samples in good condition, and has tested these samples for grouping and type; and that affiant is at a loss to understand why the blood samples in the cases of Quan Yoke Fong and Young John had hemolyzed and could not be tested.

5. That on June 9, 1955, affiant tested for grouping and type the blood of Quan Lun Hong and Gee Bo Yoke, who I am informed are the alleged parents of Quan Yoke Fong. [31]

/s/ ALBERT L. BLIFELD,
Affiant.

Subscribed and sworn to before me this 1st day of July, 1955.

[Seal /s/ JAMES R. DOOLEY,
Notary Public.

Affidavit of Service by Mail Attached.

[Endorsed]: Filed July 1, 1955. [32]

[Title of District Court and Cause.]

AFFIDAVIT OF QUAN LUN HONG

State of California,
County of Los Angeles—ss.

Quan Lun Hong, being duly sworn, deposes and says:

That he resides at 1600 Boylston, Los Angeles, California, and is a citizen of the United States; that he is the father of Quon Yoke Fong, the plaintiff herein.

That in compliance with the order of this Court, affiant and his wife, Gee Bo Yoke, submitted to a blood test; that affiant mailed to his son, Quan Yoke Fong, a copy of the order of this Court directing said Quan Yoke Fong to submit to a blood test; that hereafter, affiant and his wife received a letter, dated June 17, from Quan Yoke Fong, said letter being written and signed in the handwriting of said Quan Yoke Fong, stating that he had been to the [36] American Consulate, had submitted to the blood test and had paid Dr. Eric Vio the sum of 256.00 Hong Kong currency and \$4.00 United States currency; that said letter, together with a certified translation thereof is attached hereto, marked Exhibit "A."

That upon receipt of said letter, affiant wrote his son, Quan Yoke Fong, requesting him to obtain a statement from said doctor as to the sum paid him

in connection with the blood test; that thereafter, affiant and his wife received a letter dated July 6, from Quan Yoke Fong, which letter was written and signed in the handwriting of Quan Yoke Fong, with which was enclosed an itemized statement totaling \$256.00 on the letterhead of Dr. Eric Vio, together with a receipt in the amount of \$108.40; that said letter, together with the statment and receipt, are attached hereto, marked Exhibit "B."

/s/ QUAN LUN HONG.

Subscribed and sworn to before me this 16th day of July, 1955.

[Seal] /s/ BILLY W. LEW,
Notary Public in and for the County of Los Angeles, State of California.

My commission expires Feb. 7, 1959. [37]

EXHIBIT "A"-2

Dear Father and Mother:

I have received the documents you sent me last week. Please do not worry about it. I have been to the American Consulate to take care of things and have followed their order of procedure. They have already took a sample of my blood and send it to the United States. A fee of \$256.00 (Hong Kong

urrency) and \$4.00 (U. S. currency) was paid to Dr. Eric Vio. I hope to be able to go over soon. Business is slow. How is Brother Hang Fong doing in school? Please let me know. I am in good health and hope both of you and brother would take good care of yourselves.

Your son,

/s/ YOKE FONG.

June 17 Evening

This is a true and correct translation of a letter sent by Yoke F. Kwan, 3 Cheong Ming Street, Race Course, Hong Kong, to Mrs. Thomas Quan, 1600 N. Boyleston Street, Los Angeles 12, California, postmarked "Kowloon, Hong Kong, 18 June, 1955."

/s/ BILLY W. LEW.

Subscribed and sworn to before me this 8th day of July, 1955.

[Seal] /s/ ALBERT L. HING,
Notary Public, in and for the County of Los Angeles, State of California.

My commission expires August 26, 1955. [39]

EXHIBIT "B"-2

[Letterhead]

Dr. Eric Vio Dr. J. Carey-Hughes Dr. J. M. Park

[Addresses, etc.]

Mr. Quan Yoke Fong

To:

Messrs. Deacons (Solicitor-

Mr. Armstrong) HK \$100.00

Pan American Airways HK \$ 41.60

Stamp duty HK \$ 6.00

Dr. E. Vio HK \$108.40

HK \$256.00

Also US \$4.00 for the American Consulate General for fixing the documents.

Total: HK \$256.00 and US \$4.00.

[Receipt]

Drs. Eric Vio, J. Carey-Hughes & J. M. Park

No. 004495

6th July, 1955.

Received from Mr. Quan Yoke Fong, the sum of
 Dollars One Hundred and Eight and Cents Forty.
 For Professional Services, etc., rendered as per
 Bill No.....
 \$108.40.

/s/ [Indistinguishable.]

[Fifteen cent Hong Kong Stamp dated 6/7/55 at-
 tached.] [42]

EXHIBIT "B"-3

Dear Father and Mother:

I have received your letter and \$200.00 yesterday. Will you please don't worry about it. I am including a receipt which is given by the doctor who took a sample of my blood last time. I wish I can go over soon. On your last letter stated that the younger brother is on summer vacation for over a week already. Will you please don't let him waste all valuable time, keep him review his lesson always. I am also review my lessons very often in Hong Kong. How are you in the States? Hoping you let me know more about you.

Your son,

/s/ YOKE FONG.

July 6.

This is a true and correct translation of a letter sent by Yoke Fong, South East Asia Film Co., 580A Nathan Road, 5th fl. Kowloon, to Mr. and Mrs. Thomas Quan, 1600 N. Boylston Street, Los Angeles 12, California, U.S.A., postmarked "Yau Ma Tei, Hong Kong, July 7, 1955."

/s/ HUAN LIN CHENG.

Subscribed and sworn to before me this 16th day of July, 1955.

[Seal] /s/ BILLY W. LEW,
Notary Public in and for the County of Los Angeles, State of California.

My commission expires Feb. 7, 1959.

[Endorsed]: Filed July 18, 1955. [43]

[Title of District Court and Cause.]

MINUTES OF THE COURT
JULY 18, 1955

Hon. Harry C. Westover, District Judge.

Proceedings:

For hearing motion of defendant, filed July 1, 1955, for supplemental order to require plaintiff to furnish blood sample.

Each of Attorneys Davis and Parker, respectively, makes a statement.

It Is Ordered that cause as to said motion stand Submitted.

JOHN A. CHILDRESS,
Clerk. [44]

[Title of District Court and Cause.]

AFFIDAVIT

United States of America,
Southern District of California—ss.

James R. Dooley being first duly sworn, deposes and says:

1. That he is an Assistant United States Attorney in the office of Laughlin E. Waters, United States Attorney for the Southern District of Cali-

ornia, and as such is in charge of the files in said office pertaining to the above-captioned matter.

2. That on July 19, 1955, the said United States Attorney for the Southern District of California sent a telegram to the Department of Justice, Washington, D. C., requesting that arrangements be made to reimburse the above-named plaintiff, and other plaintiffs, for expenses incurred by them in furnishing blood samples pursuant to Court order.

3. That on July 21, 1955, the said United States Attorney sent a letter to the Department of Justice, Washington, D. C., [45] requesting that arrangements be made to reimburse the above-named plaintiff, and other plaintiffs, for expenses incurred by them in furnishing blood samples pursuant to Court order.

4. That on July 27, 1955, there was received in the office of the United States Attorney for the Southern District of California from the Department of Justice, Washington, D. C., a telegram, which read as follows:

“Litigator July 21 Young John et al v. Dulles, Civil No. 13690-HW. Please submit Form 25B to Mr. Andretta for Authorization to Reimburse Plaintiffs in This Case and in Quan Yoke v. Dulles, No. 14963-HW. This Procedure Suggested in Other Cases of Similar Nature. State Department Arranging for Consul General at Hong Kong to Forward Bills Directly Your Office in Future Cases.”

5. That Form 25B is the standard form used in the Department of Justice for requesting authorization to incur expenses in connection with litigation; and that Mr. S. A. Andretta is Administrative Assistant Attorney General to whom such forms are customarily submitted.

6. That the United States Attorney for the Southern District of California has submitted to the said Mr. S. A. Andretta Form 25-B in connection with the expenses incurred by plaintiff, Quan Yoke Fong, in the amount of \$256.00 Hong Kong currency and \$4.00 U. S. currency, and affiant knows of no reason why plaintiff should not eventually be reimbursed for these expenses.

7. That on August 12, 1955, there was received in the office of the United States Attorney for the Southern District of [46] California a telegram from the American Consulate General, Hong Kong, B.C.C., stating that a blood sample of Quan Yoke Fong was arriving at Los Angeles on August 15, 1955.

8. That affiant checked with West Coast Medical Laboratories on August 15, 1955, and a blood sample of Quan Yoke Fong was received by said establishment on August 15, 1955. That affiant was informed by West Coast Laboratories on August 16, 1955, that this blood sample had been tested for grouping and type.

9. That affiant does not know the reason or circumstances under which the blood sample of Quan

Yoke Fong, which was received by West Coast Medical Laboratories on August 15, 1955, was taken.

/s/ JAMES R. DOOLEY.

Subscribed and sworn to before me this 16th day of August, 1955.

[Seal] JOHN A. CHILDRESS,
Clerk, U. S. District Court, Southern District of
California.

By /s/ WAYNE E. PAYNE,
Deputy.

[Endorsed]: Filed August 16, 1955. [47]

[Title of District Court and Cause.]

MEMORANDUM

This action was filed on December 22, 1952. At the time the petition was filed plaintiff was in Hong Kong, and defendant refused to grant plaintiff a travel document to enable him to come to the United States to testify at the time of trial.

On May 6, 1955—twenty-nine months after the petition was filed—defendant filed a motion to require plaintiff and his alleged parents to furnish samples of blood for the purpose of examination to determine whether the blood of plaintiff was compatible with that of the asserted parents. On motion

being heard, this Court made its order which read in part as follows: [48]

“Now, Therefore, It Is Ordered:

“1. That plaintiff, Quan Yoke Fong, present himself on the 9th day of June, 1955, at 10:00 o'clock a.m., at the office of the American Consulate General, 580 Garden Road, Hong Kong, B.C.C., where he will be directed to the office of Dr. L. T. Ride Vice Chancellor, Hong Kong University, and there to furnish and permit said doctor to take a sample or samples of his blood in sufficient quantities so that such blood may be transported to the West Coast Medical Laboratories, 610 South Broadway, Los Angeles, California, for examination and testing for blood grouping and type; * * *”

Apparently in compliance with the foregoing order of May 17, 1955, plaintiff presented himself at the office of the American Consulate General, 580 Garden Road, Hong Kong, B.C.C., but was directed to the office of Dr. Eric Vio, 315 Hong Kong and Shanghai Bank Building, Hong Kong, China, there to submit himself for the purpose of giving to the government a sample of blood as directed by order of this Court. Plaintiff was required to pay to Dr. Vio \$256.00, Hong Kong currency, plus \$4.00 American currency to the American Consulate General.

After Dr. Vio took the sample from plaintiff it was shipped to the West Coast Medical Laboratories, Inc., in Los Angeles, California, but upon ex-

mination there it was discovered the blood sample had completely hemolyzed. Thereupon the government presented to this Court a motion that plaintiff be required to submit himself for another sample of his blood. [49]

When the government made its original motion for a blood sample, the Court was of the opinion that the costs entailed would be borne by the government, as the blood sample was requested by defendant. Not only did the plaintiff have to pay the doctor for taking the sample, but also there was a charge of \$4.00 American money, made by the American Consulate General for preparation of the necessary documents in connection therewith.

The government failed to comply with the order of Court as made. The order definitely specified that plaintiff was to present himself at the office of the American Consulate General, and there he was to be directed to the office of Dr. L. T. Ride, Vice Chancellor, Hong Kong University, who has heretofore obtained blood from many Chinese applicants seeking to be admitted into the United States as children of American citizens. The American Consulate General evidently directed plaintiff to the office of Dr. Vio—a doctor unknown to this Court.

If Dr. Vio was careless or negligent in taking and shipping the blood sample in question, that carelessness or negligence cannot be imputed to plaintiff, for plaintiff complied in all respects with the Court's order. The government is requesting that

the decision of this case be delayed for some months in order that another blood sample may be obtained.

This matter has been pending in the Court since December, 1952. Nearly three years have elapsed since plaintiff filed his action. If plaintiff has any legitimate claim, it should be passed upon. It should, in fact, have been passed upon before now. [50]

At the time of trial the mother and father of plaintiff appeared in Court, and each testified plaintiff was their son. Had there not been a request by defendant that plaintiff and the parents furnish a blood sample, the Court would have rendered judgment for plaintiff from the bench at the conclusion of the trial, as the testimony of a mother undoubtedly is the best evidence obtainable relative to the paternity and birth of her child. The government filed its motion requesting blood samples just prior to trial.

Judgment at the time of trial was delayed because of the blood sample request. The matter was submitted to the Court on the evidence presented at the trial. The Court is satisfied with the testimony of the witnesses in this case, which testimony in the Court's opinion establishes plaintiff's claim that he is the son of an American citizen. The Court does not feel constrained to continue the matter further.

The motion for supplemental order relative to furnishing by plaintiff of another blood sample is

denied, and the Court now orders judgment in favor of plaintiff.

Dated this 16th day of August, 1955.

/s/ HARRY C. WESTOVER,
United States District Judge.

[Endorsed]: Filed August 16, 1955. [51]

[Title of District Court and Cause.]

MINUTES OF THE COURT
AUGUST 16, 1955

Hon. Harry C. Westover, District Judge.

Proceedings:

Filed affidavit of respondent re blood samples.

Court denies U. S. Attorney's motion for supplemental order and finds for plaintiff; attorney for plaintiff to prepare findings and judgment.

JOHN A. CHILDRESS,
Clerk. [52]

[Title of District Court and Cause.]

FINDINGS OF FACT AND
CONCLUSIONS OF LAW

The above-entitled cause came on regularly to be heard in the above-entitled Court on June 1, 1955,

before the Honorable Harry C. Westover, Judge Presiding, Kathleen Parker appearing as attorney for the plaintiff, Quan Yoke Fong, and Laughlin E. Waters, United States Attorney, and Max F. Deutz, Assistant United States Attorney, by James R. Dooley, Assistant United States Attorney, appearing as attorneys for defendant John Foster Dulles, Secretary of State of the United States of America; and evidence, both oral and documentary, having been introduced and the cause having been argued and submitted for decision, the Court now makes its findings of fact and conclusions of law as follows: [53]

Findings of Fact

I.

That plaintiff, Quan Yoke Fong, was born on February 13, 1930 (CR 19-1-15) at Kowkwong City, Kwangtung, China.

II.

That plaintiff's father is Quan Lun Hong, also known as Tommy Quan; that said Quan Lun Hong is a citizen of the United States; that plaintiff's mother is Gee Bo Yoke; that plaintiff's father, Quan Lun Hong, married said Gee Bo Yoke in Ping On Village, Kowkwong, China, on July 29, 1921 (CR 10-6-25); that plaintiff is the lawful issue of said marriage; that plaintiff's father, Quan Lun Hong, was a citizen of the United States at the time of the birth of plaintiff, Quan Yoke Fong, and that said Quan Lun Hong lived and resided in the United States from a time prior to the date of plain-

tiff's birth; that plaintiff's place of residence is Los Angeles, County of Los Angeles, State of California.

III.

That defendant John Foster Dulles is the duly qualified Secretary of State of the United States of America and is executive head of the United States Department of State and of the United States Consular Service.

IV.

That plaintiff, Quan Yoke Fong, has at all times herein mentioned claimed to be a citizen and national of the United States of America, and claimed the right to enter, stay, remain and reside permanently in the United States as a national and citizen thereof; that on May 13, 1952, plaintiff, Quan Yoke Fong, executed and filed with the American Consul at Hong Kong, B.C.C., China, an application for an American passport; that prior to the date of [54] the filing of the complaint herein no action had been taken by the American Consul on said application; that the delay in acting thereon was unreasonable and the failure to act on said passport application within a reasonable time was a denial of plaintiff's rights and privileges as a national and citizen of the United States by defendant through his agents and subordinates.

Conclusions of Law

Upon the foregoing findings of fact, the Court concludes:

I.

That Quan Yoke Fong is, and since his birth on February 13, 1930 (CR 19-1-15) has been, a national and citizen of the United States of America.

The clerk is ordered to enter judgment.

Dated: September 2, 1955.

/s/ HARRY C. WESTOVER,
United States District Judge.

Lodged August 22, 1955.

[Endorsed]: Filed September 2, 1955. [55]

United States District Court, Southern District
of California, Central Division

No. 14963-HW

QUAN YOKE FONG,

Plaintiff,

vs.

JOHN FOSTER DULLES, as Secretary of State,

Defendant.

JUDGMENT DETERMINING
AMERICAN CITIZENSHIP

The above-entitled matter having come on for trial on June 1, 1955, before the Honorable Harry C. Westover, Judge Presiding, Kathleen Parker appearing as attorney for plaintiff, and Laughlin E. Waters, United States Attorney, and Max F. Deutz,

Assistant United States Attorney, by James R. Dooley, Assistant United States Attorney, appearing as attorneys for defendant, the said defendant having filed an answer to the complaint, and the Court having heard the testimony of the witnesses and considered the evidence, both oral and documentary, together with arguments of counsel for the respective parties, and being fully advised in the premises and having made its findings of fact and conclusions of law, [57]

It Is Hereby Ordered and Adjudged that Quan Yoke Fong, the plaintiff herein, is a national and citizen of the United States of America.

Dated: September 2, 1955.

/s/ HARRY C. WESTOVER,
United States District Judge.

Receipt of Copy Acknowledged.

Lodged August 22, 1955.

[Endorsed]: Filed September 2, 1955.

Docketed and Entered Sept. 2, 1955. [58]

Title of District Court and Cause.]

MOTION FOR NEW TRIAL

The defendant moves the Court for an Order granting a new trial in the above-entitled action in which judgment was entered on September 2, 1955, on the following grounds:

1. Newly-discovered evidence (in a form which is admissible), material for the defendant, which the defendant could not with reasonable diligence have discovered and produced at the trial.

2. Newly-obtained evidence (in a form which is admissible), material for the defendant, which the defendant could not with reasonable diligence have obtained and produced at the trial.

3. Manifest error of fact in the Court's Finding of Fact that Quan Yoke Fong is the lawful issue of Quan Lun Hong.

4. Manifest error of law in the Court's Conclusion of Law that Quan Yoke Fong is a national and citizen of the United States of America.

This Motion is based upon and will be presented upon Exhibits A through F attached hereto, these Motion papers and Memorandum of Points and Authorities in support thereof, together with all the records and files herein.

Dated: This 9th day of September, 1955.

LAUGHLIN E. WATERS
United States Attorney;

MAX F. DEUTZ,
Assistant U. S. Attorney,
Chief of Civil Division;

/s/ JAMES R. DOOLEY,
Assistant U. S. Attorney,
Attorneys for Defendant.

EXHIBIT A

Affidavit of James R. Dooley

United States of America,
Southern District of California—ss.

James R. Dooley, being first duly sworn, deposes
and says:

That he is an Assistant United States Attorney
for the Southern District of California, and one of
the attorneys for the defendant in the above-en-
titled cause;

That the within action was tried before the Hon.
Harry C. Westover on the 1st day of June, 1955,
and resulted in a judgment being rendered in favor
of the plaintiff and against the defendant adjudging
that plaintiff, Quan Yoke Fong, is a national and
citizen of the United States of America.

That since the time of said trial, evidence in a
form which is admissible has become available,
which affiant believes to be of great importance to
defendant, and which, if shown at the trial herein
would have been of decisive character in defense
against plaintiff's claim.

That the aforementioned evidence shows, based
upon blood tests made of plaintiff and his alleged
parents that it is not possible for plaintiff to be the
child of his alleged father, Quan Lun Hong (re-
ferred to in Exhibits "B" and "C" as Lun Hong
Quan); and that consequently, it was not possible
for plaintiff to have acquired citizenship of the

United States through said Quan Lun Hong, as plaintiff claimed and as this Court found.

That this evidence consists of the following:

- a. The testimony of Albert A. Blifeld, clinical laboratory technician, employed by West Coast Medical Laboratories, Inc., who tested the blood of plaintiff and that of his alleged parents, and whose affidavit is attached hereto as Exhibit "B"; [63] together with all documents and other tangible things in possession of West Coast Medical Laboratories relating to such tests.
- b. The testimony of Doctor Michael A. Rubinstein, hematologist, who evaluated the results of the blood tests made by the aforementioned Albert A. Blifeld, and who concluded that it was not possible for Quan Lun Hong (Lun Hong Quan) to be the blood father of Quan Yoke Fong. His affidavit is attached hereto as Exhibit "C."
- c. The affidavit of Dr. Eric Vio, exemplified under the seal of the American Consulate General, Hong Kong, B.C.C., concerning the drawing of a blood sample from plaintiff, Quan Yoke Fong, and concerning the shipment of said sample to West Coast Medical Laboratories. This affidavit is attached hereto as Exhibit "D."
- d. The affidavit of plaintiff, Quan Yoke Fong, exemplified under the seal of the American Consulate General, Hong Kong, B.C.C., concerning the drawing of samples of his blood, hereto attached as Exhibit "E."

e. The affidavit of Leo J. Moser, Vice Consul of the United States of America, bearing the seal of the American Consulate General, Hong Kong, B.C.C., concerning the drawing of blood samples from plaintiff, Quan Yoke Fong, hereto annexed as Exhibit "F."

That the defendant could not with reasonable diligence have obtained and produced the aforementioned evidence at the trial of this action for the following reasons:

a. The plaintiff, Quan Yoke Fong, has at all times since the Petition herein was filed, resided outside the continental limits of the United States, and affiant believes that plaintiff at all times since the filing of his Petition has resided at Hong Hong, B.C.C. [64]

b. Although the Petition herein was filed on December 23, 1952, the passport file relating to plaintiff (Defendant's Exhibit "A") was not received in the office of the United States Attorney for the Southern District of California until on or about March 19, 1954.

c. Upon receipt of said passport file, affiant did not know whether or not plaintiff would be issued a certificate of identity for the purpose of travelling to the United States to prosecute his action, as provided in Section 503 of the Nationality Act of 1940, 54 Stat. 1171, 8 U.S.C.A., §903; nor did affiant knew or believe at that time that the court would proceed to trial in the absence of the plaintiff.

d. Up until the decision of this Court on March 1, 1955 in *Ong Hong Way v. Dulles*, Civil No. 13,379, affiant was of the opinion that the reports of blood tests made of plaintiff and his alleged parents contained in a duly authenticated passport file of the Department of State relating to plaintiff would be admissible in evidence under the provisions of 28 U.S.C.A. §§ 1732 and 1733.

e. After the aforementioned decision holding that such reports were not admissible in evidence, and after information was obtained indicating that plaintiff would not be permitted to come to the United States, the defendant moved the Court on May 6, 1955, for an Order requiring plaintiff to furnish a sample or samples of his blood to be transported to the United States for testing; and since that time the defendant with due diligence has been seeking to obtain a sample of plaintiff's blood as the file herein will disclose.

/s/ JAMES R. DOOLEY.

Subscribed and sworn to before me this 12th day of September, 1955.

[Seal] JOHN A. CHILDRESS,
Clerk, U. S. District Court,
Southern District of Calif.

By /s/ [Indistinguishable.]
Deputy. [65]

[Title of District Court and Cause.]

EXHIBIT B

AFFIDAVIT OF ALBERT L. BLIFELD

State of California,
County of Los Angeles—ss.

Albert L. Blifeld, being first duly sworn, deposes
and says:

I am a clinical laboratory technician, licensed by
the State of California, and I am employed in that
capacity by West Coast Medical Laboratories, Inc.,
610 South Broadway, Los Angeles, California. I
have had thirteen years experience in all phases of
clinical laboratory work. During my experience I
have examined thousands of blood specimens; and
have done these specific typing and grouping tests
for the Immigration and Naturalization Service for
a period of approximately three years.

On June 9, 1955, one Lun Hong Quan (Quan Lun
Hong) and one Gee Bo Yook (Gee Bo Yoke) ap-
peared at West Coast Medical Laboratories in
order to have their blood tested. On that date I ex-
tracted blood [66] specimens from Lun Hong Quan
and Gee Bo Yook and examined each of these speci-
mens for blood group and MN type, with results
as follows:

Lun Hong Quan

Blood Group:	"AB"
MN Factors:	"M" positive "N" positive
MN Type:	Type "MN"

Gee Bo Yook

Blood Group:	"B"
MN Factors:	"M" positive "N" positive
MN Type:	Type "MN"

At the time of their appearance on June 9, 1955, Lun Hong Quan and Gee Bo Yook identified themselves by affixing their signatures to statements to the effect that they were appearing pursuant to court order. These statements are being retained in the files of West Coast Medical Laboratories, Inc.

On August 15, 1955, at approximately 3:10 o'clock P.M. there was delivered to West Coast Medical Laboratories a sealed container, which by its markings indicated that it was sent from Dr. E. Vio, 315 H. K. Bank Bldg., Hong Kong. The container was addressed to West Coast Medical Laboratories, Inc. Inside this container were several vials, also sealed, two of which bore the name Quan Yoke Fong. The aforementioned container indicates that it was shipped via Pan American World Airways System, Air Waybill #026-14-562015. The container and vials mentioned above are being retained by West Coast Medical Laboratories, Inc. I have examined the blood specimens contained in the vials bearing the name Quan Yoke Fong for blood group and MN type, with the following results:

Blood Group:	"O"
MN Factors:	"M" positive "N" negative
MN Type:	Type "M"

Each of the aforementioned blood tests were made by me personally, and I took all possible precautions to insure the [67] accuracy of these tests. At the time of making each of these tests I made a record of the type of serum used, the condition of the blood, and the results of the test; and such records are being retained in the files of West Coast Medical Laboratories, Inc.

I am willing to testify in court concerning the matters set forth in this affidavit, and to bring with me all documents and other evidence relating thereto.

/s/ ALBERT L. BLIFELD.

Subscribed and sworn to before me this 23d day of August, 1955.

[Seal] /s/ JAMES R. DOOLEY,
Notary Public.

My Commission Expires Nov. 19, 1957. [68]

EXHIBIT C

[Title of District Court and Cause.]

AFFIDAVIT OF MICHAEL A. RUBINSTEIN

State of California,
County of Los Angeles—ss.

Michael A. Rubinstein, being first duly sworn, deposes and says:

That he is a Doctor of Medicine, licensed to prac-

tice medicine by the State of California and by the State of New York; that he is a specialist in internal medicine, including hematology, and is now practicing in the State of California, with offices at 414 North Camden Drive, Beverly Hills, California.

That from 1943 to 1953 affiant was hematologist at Montefior Hospital, New York City, New York; that from 1943 to 1952 he was a member of the hematologist staff of Mount Sinai Hospital, New York, New York; that from 1946 to 1953 affiant was a member of the faculty of Columbia University, New York City, teaching hematology; and that from 1950 to 1953 he was Assistant Clinical Professor of Medicine at [69] New York Medical College, New York City, New York. That at present and since 1954 affiant has been a member of the staff of Cedars of Lebanon Hospital, Los Angeles, California. That affiant is a Diplomat of the American Board of Internal Medicine and is certified as a specialist in internal medicine by said Board.

That affiant has read an Affidavit of Albert L. Blifeld dated August 23, 1955, which shows that the results of certain blood tests conducted by said Albert L. Blifeld were as follows:

Lun Hong Quan

Blood Group: "AB"

MN Factors: "M" positive

"N" positive

MN Type: Type "MN"

Gee Bo Yook

Blood Group: "B"

MN Factors: "M" positive

"N" positive

MN Type: Type "MN"

Quan Yoke Fong

Blood Group: "O"

MN Factors: "M" positive

"N" negative

MN Type: Type "M"

That affiant has been informed by Assistant United States Attorney James R. Dooley that Quan Yoke Fong whose name appears above claims that Lun Hong Quan named above is his blood father and that Gee Bo Yook named above is his blood mother. That affiant was requested by said Assistant United States Attorney to evaluate the results of the blood tests set forth above for the purpose of determining whether it is medically possible for Quan Yoke Fong to be the child of Lung Hong Quan and Gee Bo Yook.

That affiant has studied the results of the blood tests as set forth in the Affidavit of Albert L. Blied and as recapitulated above. That while affiant is in no position to guarantee the accuracy of the results of the blood tests set forth above, since these tests were not conducted by him; it is the opinion of affiant, based upon his education, training, and experience in the field of hematology, that if Quan

Yoke Fong has blood of the group and type as set forth above, and if Lun Hong Quan and Gee Bo Yook have blood of the groups and types as set forth above, it is not possible for Lun [70] Hong Quan to be the blood father of Quan Yoke Fong.

Affiant has reached the foregoing conclusion for the following reasons:

A person of group "O" cannot be a child of a person of group "AB," because a child receives one gene from each of his parents. A child of a father of "AB" group will receive from him the "A" or "B" gene, and therefore will be either a group "A," "B," or "AB" (depending on the blood group of his mother), but never can he be of group "O," since this group contains neither "A" nor "B."

I am willing to testify in Court concerning the matters set forth in this Affidavit.

/s/ MICHAEL A. RUBINSTEIN.

Subscribed and sworn to before me this 8th day of September, 1955.

[Seal] /s/ J. K. CLARKE.

My commission expires Dec. 22, 1958. [71]

EXHIBIT D

Colony of Hong Kong,
City of Victoria,
Consulate General of the
United States of America—ss.

I, Leo J. Moser, Vice Consul of the United States of America in and for the consular district of Hong Kong, duly commissioned and qualified, do hereby certify that Harold John Armstrong, whose true signature and official seal are respectively subscribed and affixed to the annexed document, was, on the 12th day of August, 1955, the day of the date hereof, a Notary Public in and for the British Crown Colony of Hong Kong, duly commissioned and authorized to administer oaths and affirmations and to take declarations, to whose official acts full faith and credit are due.

For the contents of the annexed document no responsibility is assumed.

In witness whereof I have hereunto set my hand and the seal of the American Consulate General at Hong Kong this fifteenth day of August, 1955.

[Seal] /s/ LEO J. MOSER,

Vice Consul of the United
States of America.

Service No. 1979

No fee prescribed. [72]

Drs. Eric Vio, J. Carey-Hughes & J. M. Park

Affidavit

Colony of Hong Kong,
City of Victoria—ss.

I, Eric Vio, do hereby make oath and say that:

1. I am a qualified physician duly licensed to practice in the Colony of Hong Kong;

2. On the 12th day of August, 1955, I drew a sample of blood from Quan Yoke Fong at my office located at Hong Kong Bank Building, Victoria, in the said Colony;

3. Such blood sample was forthwith placed by me in a vial in the presence of the donor and of the undersigned Notary Public;

4. The said vial was sealed with sealing wax by the said Notary Public who affixed his Seal thereto and labeled as follows: "Quan Yoke Fong."

5. The said vial was then delivered to Pan American Airways for shipment by Air Express, under refrigeration, to The West Coast Medical Laboratory, 610 South Broadway, Los Angeles, California.

Sworn at Hong Kong Bank Building, Hong Kong
this 12th day of August 1955.

Before me,

[Seal] /s/ H. J. ARMSTRONG,
Notary Public, Hong Kong.

EXHIBIT E

Colony of Hong Kong,
City of Victoria,
Consulate General of the
United States of America—ss.

I, Leo J. Moser, Vice Consul of the United States of America in and for the consular district of Hong Kong, duly commissioned and qualified, do hereby certify that Harold John Armstrong, whose true signature and official seal are respectively subscribed and affixed to the annexed document, was, on the 12th day of August, 1955, the day of the date hereof, a Notary Public in and for the British Crown Colony of Hong Kong, duly commissioned and authorized to administer oaths and affirmations and to take declaration, to whose official acts full faith and credit are due.

For the contents of the annexed document no responsibility is assumed.

In witness whereof I have hereunto set my hand and the seal of the American Consulate General at Hong Kong this fifteenth day of August, 1955.

[Seal] /s/ LEO J. MOSER,

Vice Consul of the United
States of America.

Service No. 1978.

No fee prescribed. [74]

Drs. Eric Vio, J. Carey-Hughes & J. M. Park

Affirmation

Colony of Hong Kong,
City of Victoria—ss.

I, Quan Yoke Fong of 3, Cheong Ming Street, 1st floor, Hong Kong, do solemnly and sincerely affirm and say as follows:

1. On the 12th day of August, 1955, I attended at the office of Dr. Eric Vio, Hong Kong Bank Building Victoria in the Colony of Hong Kong.

2. When there Dr. Vio took a sample of blood from me and such blood sample was forthwith placed by him in a vial in my presence and in the presence of the undersigned notary public.

3. The said vial was then sealed with sealing wax by the said notary public who affixed his seal thereto and labelled as follows: "Quan Yoke Fong."

Affirmed at the Hong Kong Bank Building, Hong Kong, this 12th day of August, 1955, through the interpretation of Tang Hing Kim the said Tang Hing Kim having also been affirmed that he had distinctly and audibly interpreted the contents of this document to the Affirmant and that he would truly and faithfully interpret the Affirmation about to be administered to him. [75]

Before me,

[Seal] /s/ H. J. ARMSTRONG,

Notary Public, Hong Kong.

I, Tang Hing Kim, do hereby affirm and say that I well understand the English and Chinese languages and that I have truly and distinctly and audibly interpreted the contents of this document to the Affirmant Quan Yoke Fong and I will truly and faithfully interpret the Affirmation about to be administered to him (her).

Affirmed at 315 H. K. Bank Building, Hong Kong, this 12th day of August, 1955.

Before me,

[Seal] /s/ H. J. ARMSTRONG,
Notary Public, Hong Kong.

EXHIBIT F

Colony of Hong Kong,
City of Victoria,
Consulate General of the
United States of America—ss.

Before me, R. S. Anderson, Vice Consul of the United States of America at Hong Kong, British Crown Colony, duly commissioned and qualified, personally appeared Leo J. Moser, who, being duly sworn according to law, deposes and says:

1. My name is Leo J. Moser and I am a Vice Consul of the United States of America at Hong Kong, British Crown Colony;

2. On August 12, 1955, I did personally witness the drawing of two samples of blood from Quan Yoke Fong for the second time as directed by the Department of State in an instruction dated July 6, 1955;

3. Such samples were drawn by Dr. Eric Vio at his office located in the Hongkong and Shanghai Bank Building, Victoria, Hong Kong, British Crown Colony, and placed by said doctor in vials in the presence of the donor, Harold John Armstrong, a duly commissioned Notary Public in and for the British Crown Colony of Hong Kong, and myself;

4. The donor did then and there execute an affidavit before said Notary Public and in my presence stating the facts of the blood drawing, this affidavit having been previously translated to the donor by an interpreter, who then and there executed an affirmation as to the adequacy of his interpretation;

5. Dr. Eric Vio did then and there execute a similar affidavit before said Notary Public and in my presence stating the facts of the blood drawing;

6. The donor and I then witnessed the sealing of the vials by said Notary Public and their labeling with the name of the donor;

And further deponent saith not.

/s/ LEO. J. MOSER.

Subscribed and sworn to before me this sixteenth
day of August, 1955.

[Seal] /s/ R. S. ANDERSON,

Vice Consul of the United
States of America.

Service No. 2237

No fee prescribed.

Affidavit of service by mail attached.

[Endorsed]: Filed September 12, 1955. [77]

[Title of District Court and Cause.]

MINUTES OF THE COURT

OCT. 3, 1955

Hon. Harry C. Westover, District Judge.

Proceedings: .

For hearing motion of defendant, filed Sept. 12,
1955, for new trial.

Attorney Dooley argues in support of motion.

Court orders said motion of defendant for a new
trial denied.

JOHN A. CHILDRESS,

Clerk. [97]

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that John Foster Dulles,
as Secretary of State, defendant above named,

hereby appeals to the United States Court of Appeals for the Ninth Circuit from the final Judgment entered in this action on September 2, 1955.

Dated: This 28th day of October, 1955.

LAUGHLIN E. WATERS,
United States Attorney;

MAX F. DEUTZ,
Assistant U. S. Attorney,
Chief of Civil Division;

/s/ JAMES R. DOOLEY,
Assistant U. S. Attorney,
Attorneys for Defendant.

[Endorsed]: Filed October 28, 1955. [98]

[Title of District Court and Cause.]

STIPULATION REGARDING EXHIBITS

It is hereby stipulated, by and between the parties hereto, through their respective counsel, that the exhibits received in evidence in this cause may be considered in their original form by the United States Court of Appeals for the Ninth Circuit in connection with the pending appeal, and need not be printed.

Dated: This 12th day of January, 1956.

/s/ KATHLEEN PARKER,
Attorney for Plaintiff.

LAUGHLIN E. WATERS,
United States Attorney;

MAX F. DEUTZ,
Assistant U. S. Attorney,
Chief of Civil Division;

/s/ JAMES R. DOOLEY,
Assistant U. S. Attorney,
Attorneys for Defendant.

Receipt of copy acknowledged.

[Endorsed]: Filed January 24, 1956. [102]

In the United States District Court, Southern
District of California, Central Division

No. 14963-HW Civil

Honorable Harry C. Westover, Judge Presiding.

QUAN YOKE FONG,

Plaintiff,

vs.

JOHN FOSTER DULLES, Secretary of State,
Defendant.

REPORTER'S TRANSCRIPT OF
PROCEEDINGS

Appearances:

For the Plaintiff:

KATHLEEN PARKER.

For the Defendant:

LAUGHLIN E. WATERS,
United States Attorney;

By JAMES R. DOOLEY,
Assistant United States Attorney.

May 16, 1955, 10:00 A.M.

The Clerk: Quon Yoke Fung vs. John Foster Dulles. Secretary of State, No. 14963-HW Civil, for hearing motion of defendant to dismiss, and motion of defendant to require parties to furnish samples of their blood and undergo blood tests.

Miss Parker: Ready for the plaintiff, your Honor.

Mr. Dooley: Ready, your Honor.

The Court: Mr. Dooley, your motion to dismiss is on what ground?

Mr. Dooley: The plaintiff was not denied a right or privilege at the time the complaint was filed.

The Court: What was the period that elapsed between the date of the application and the date of request and the filing of the suit?

Mr. Dooley: There was approximately a little over seven months.

The Court: Motion denied.

Mr. Dooley: The application was filed, I believe, your Honor, in May 1952, and this is a little closer than some of those that the court has denied. May 13, 1952.

The Court: You had seven months. I think

seven months is ample time for the Department to make some determination. Motion denied.

Miss Parker: Is the motion for the blood test granted? [3*]

The Court: The motion for the blood test is granted.

Mr. Dooley: I have the order, your Honor.

Miss Parker: If the court please. I don't know whether this is the proper time to bring up this matter, but the plaintiff's mother in this case—this case is set for trial July 11, and the plaintiff's mother is contemplating a trip to Hong Kong to visit the plaintiff. Could the court give me any idea when this will be tried? I don't know whether to let her go to Hong Kong or keep her here. The mother and father are both here. She wanted to go to Hong Kong in July. If the case will be tried during July and August, I will keep her here.

The Court: You know, if she is here, I certainly wouldn't have her go back to Hong Kong. She might never get back. If she is here, and she wants this party to come in—have you got the mother and father both here?

Miss Parker: I have the mother and father both here, your Honor.

The Clerk: It is on the setting calendar for July 11.

The Court: Are you getting any of these blood samples back?

Mr. Dooley: No, your Honor. You remember the

*Page numbering appearing at top of page of original Reporter's Transcript of Record.

one just now that was dismissed, the plaintiff didn't show up for the blood sample and the motion was based on that ground. That was 13379. [4]

Miss Parker: What does your order show on this? What date have you asked the plaintiff to appear?

Mr. Dooley: I believe it was June 9th.

The Court: Can we do this? If the mother and father are here, can't we go ahead and take their testimony and then hold in abeyance the report on the blood sample? If the father and mother are here and they will testify, the government has pretty near an insurmountable barrier to get over. If the blood is compatible in any way, the judgment will be a matter of course.

Mr. Dooley: Yes, your Honor. The defendant has no objection to that procedure. We are contending that the blood is not compatible.

The Court: I don't know whether it is or not. You know, there have been mistakes made over there.

Mr. Dooley: Yes, your Honor.

The Court: It is just possible that I might be able to work this case in before July. I could probably try this case next week and then if the mama wants to go to Hong Kong, all right, but if she is here, I want her testimony.

Miss Parker: Well, if she goes to Hong Kong, she will go with an American passport.

The Court: But if she is here, I want her testimony. I don't want her to get over to Hong Kong first. Can you try it some time next week? [5]

Miss Parker: Your Honor. I have a denaturali-

ation case scheduled next week that is likely to take the entire week.

The Court: Suppose I set the matter for trial in the week of the 30th. The 30th is a holiday, so you will have to come in on the 31st to determine when we can have a trial.

Mr. Dooley: Very well, your Honor.

The Court: If I have got the mama and papa here, I would like to have their testimony.

Mr. Dooley: Your Honor, in connection with the motion made to dismiss the action, I would like to submit the passport file in evidence on that motion.

The Court: It may be submitted.

Mr. Dooley: And I should also like to present the statement concerning the processing of passport application in Hong Kong.

The Court: Over objection, it may be admitted.

Mr. Dooley: Your Honor, I would like to withdraw that and substitute a photostatic copy.

The Court: Such may be the order.

Mr. Dooley: I don't have the photostatic copy at present, your Honor.

Miss Parker: The passport file, your Honor, is admitted solely for the purpose of establishing the dates, is that correct?

The Court: Only for the purpose of establishing the dates [6] when the application was made and when the suit was filed, et cetera. Here is your order relative to the blood tests, Mr. Dooley.

The Clerk: Those will be Defendant's Exhibits A and B in case 14963.

(The exhibits referred to were marked as Defendant's Exhibits A and B and received in evidence.) [7]

Tuesday, May 31, 1955—10:00 A.M.

The Clerk: Quon Yoke Fong vs. John Foster Dulles, No. 14963-HW Civil, for trial.

Miss Parker: Ready for the plaintiff.

Mr. Dooley: The defendant is ready, your Honor.

The Court: When will you be ready to go to trial?

Miss Parker: Any time.

Mr. Dooley: Any time, your Honor. This is a case where decision will be postponed until the blood test is determined.

The Court: Tomorrow?

Miss Parker: Satisfactory.

Mr. Dooley: Satisfactory.

The Court: Wednesday morning at 10:00 [9] o'clock.

Tuesday, June 1, 1955, 10:00 A.M.

The Clerk: No. 14963-HW Civil, Quon Yoke Fong vs. John Foster Dulles, Secretary of State, trial.

Miss Parker: Ready for the plaintiff, your Honor.

Mr. Dooley: Ready for the defendant, your Honor.

The Court: Will we need an interpreter?

Miss Parker: Yes, for Mrs. Quon.

The Court: Swear the interpreter.

(Lily L. Chan was thereupon sworn to interpret from English into Chinese and from Chinese into English.)

Mr. Dooley: May I have a short examination of the interpreter, your Honor?

The Court: Yes.

LILY CHAN

Called as a witness herein by the defendant, having been first duly sworn, was examined and testified as follows:

Voir Dire Examination

By Mr. Dooley:

Q. Mrs. Chan, do you know the plaintiff in this case?
A. I do not, no.

Q. Do you know the witnesses in this case?
A. No.

Q. Have you discussed this case with the witnesses who [11] are to appear in this case?
A. No.

Q. Have you discussed this case previously with anyone?

A. No. I have never seen any of them until today.

Mr. Dooley: No further questions.

(Witness excused.)

The Court: I will make the regular order that all the witnesses, except the witness on the stand, will remain out of the courtroom until called.

Miss Parker: Mr. Quon, will you take the stand?

LUN HONG QUAN

called as a witness herein by and on behalf of the plaintiff, having been first duly sworn, was examined and testified, without the use of the interpreter, as follows:

The Clerk: Will you take the stand, sir, and state your name?

The Witness: My name is Lun Hong Quan.

Miss Parker: If the Court please, the government will stipulate that Quan Lun Hong made three trips to China. The first one, he departed May 7, 1921, returned May 7, 1922. Departed March 1, 1929, returned July 9, 1930. Departed March 30, 1937, and returned July 22, 1938.

That he was admitted to the United States as the son [12] of a native on July 6, 1916.

The Court: Is that stipulated?

Mr. Dooley: So stipulated, with one exception. There is probably an error on this return date for the second trip. My notations——

Miss Parker: Returned May 4, 1922, your Honor.

Mr. Dooley: So stipulated.

Miss Parker: Do the immigration records show the marriage date?

Mr. Dooley: The immigration records in that respect would only show what the witnesses stated. With respect to the marriage, the immigration records would only show what one of the witnesses stated, and I don't know whether what they——

The Court: Well, we come to the same place in

(Testimony of Lun Hong Quan.)

this case as in the other cases. Where one child is admitted as a native or as a national, it seems to me that the government doesn't stand in a very good position in denying the marriage, because if the government did not admit the marriage, they wouldn't have admitted the first child, because that is necessary in all these cases. According to the information I have, there is a brother of the plaintiff admitted to the United States in 1951. Isn't that true?

Mr. Dooley: By the immigration authorities.

The Court: Yes.

Mr. Dooley: The decision of the immigration authorities [13] is more in the nature of an opinion that the witnesses were telling the truth when they stated a particular matter. It isn't something like, for instance, the departures and the returns. That is something that the Service knows as a fact, because they kept records when the individual left. But as far as the existence of the marriage, it is only an opinion.

The Court: All right. You can ask the witness. It's a very simple matter to have the witness testify that they were married.

Miss Parker: Will you also stipulate, Mr. Dooley, Gee Bo Yoke was admitted to the United States as the wife of a citizen on April 18, 1949?

Mr. Dooley: So stipulated.

Miss Parker: And Quan Hang Fong was admitted to the United States as a citizen on August 3, 1951?

(Testimony of Lun Hong Quan.)

Mr. Dooley: So stipulated.

Direct Examination

By Miss Parker:

Q. Mr. Quan, where do you reside? Where do you live? A. 1600 North Boylston.

Q. How long have you been a resident of Los Angeles County? A. Since 1925.

Q. Since 1925? A. Yes. [14]

Q. Where were you born? A. China.

Q. Of what country are you a citizen?

A. America.

Q. Are you married? A. Yes.

Q. What is the name of your wife?

A. Gee Bo Yoke Quan.

Q. When and where were you married?

A. In Ping On Village, Kowkwong.

Q. What is the date of your marriage?

A. 1921, in July.

Q. Is that your only marriage? A. Yes.

Q. What are the names of your children?

A. Quan Yoke Fong and Quan Hang Fong.

Q. Where and when were your children born?

A. In Kowkwong, China.

Q. What is the date of their birth?

A. Quan Yoke Fong, born in 1922, February 7.

The Court: Which one is that?

The Witness: February 13.

Mr. Dooley: Your Honor, we are not able to hear the witness. [15]

(Testimony of Lun Hong Quan.)

The Court: Will you speak up? The attorneys have to hear, so please speak up.

The Witness: Born in 1922, February 13.

The Court: Who was that?

The Witness: Quan Yoke Fong.

The Court: 1922?

The Witness: Yes.

Q. (By Miss Parker): That was the same year you were married, Mr. Quan?

A. I didn't hear.

Q. Is that the same year you were married?

A. No. 1921, I marry.

Q. Were you in China——

The Court: Well, let's get the second brother. He has only testified as to one.

The Witness: The youngest son, Quan Hang Fong.

Q. (By Miss Parker): He was born when?

A. 1938.

Q. What date? A. May 24.

Q. Were you in China when either of your sons was born? A. Yes.

Q. Were you in China when Quan Yoke Fong was born? A. Yes.

Q. Were you in China when Quan Hang Fong was born? [16] A. Yes.

Q. When you returned to China in 1929, did you go directly to your village? In 1929, when you returned to China, did you go directly to your village?

A. Yes.

Q. And you stayed in China on that trip for a

(Testimony of Lun Hong Quan.)

little over a year. Were you in the village during that entire time? A. Yes.

Q. Did you live with your wife in the village home at that time? A. Yes.

Mr. Dooley: Object to the question, your Honor, as being leading and suggestive.

The Court: Overruled.

Q. (By Miss Parker): When you returned to China on your third trip in 1937, did you go to your village? A. Yes.

Q. Did you stay in the village during the entire time you were in China? A. Yes.

Q. Did you go to your home and did you live with your wife and your children at that time?

Mr. Dooley: Object, your Honor, to the question as calling for a yes or no answer.

The Court: Overruled. Read the question. [17]

(Question read.)

The Witness: Yes.

Q. (By Miss Parker): What is the present residence of your wife? Where does your wife live at the present time? A. Now, you mean?

Q. Yes. A. Live with me.

Q. She lives with you in Los Angeles?

A. Yes. On Boylston.

Q. Where is your son, Quon Yoke Fong, at the present time? A. In Hong Kong.

Q. Where is your son, Quan Hang Fong?

A. He live with me now.

Q. He lives with you at the present time?

(Testimony of Lun Hong Quan.)

A. Yes.

Q. Mr. Quan, did you sign an affidavit for the purpose of bringing your son, Quan Yoke Fong, to the United States? A. I did not hear that.

Q. Did you execute an affidavit for the purpose of bringing your son, Quan Yoke Fong, to the United States?

A. Can I ask—I don't understand that word.

The Court: Affidavit? Better explain what an affidavit is.

Q. (By Miss Parker): Did you sign any document in which [18] you listed your children's names and your trips and your citizenship, on which was contained a photograph of yourself and your son, Quan Yoke Fong, for the purpose of having Quan Yoke Fong come to the United States in approximately——

The Court: Miss Parker, if you have the affidavit, I think the affidavit is the best evidence, or, if the government has it, it is the best evidence.

Miss Parker: I have a copy of it, your Honor.

The Court: Has the government got the original?

Miss Parker: The original is in the passport file.

Mr. Dooley: In the passport file which was introduced in evidence in support of the motion to dismiss.

The Court: Let's see the passport file.

The Clerk: I suggest Mr. Dooley withdraw the exhibits and they be reoffered in the trial to keep it straight.

(Testimony of Lun Hong Quan.)

The Court: They are not in evidence?

The Clerk: They are in evidence as far as the hearing on the motion.

The Court: Let me see the file. Miss Parker, here is the original. Rather than ask the witness what he did, I think the document is the best evidence.

Miss Parker: I will be glad to offer the document in evidence if the Court will accept the document other than the whole file.

The Court: It may be received in evidence. [19]

Mr. Dooley: Objection, your Honor.

The Court: Well, I waited for an objection and I didn't hear any.

Mr. Dooley: I did not know that it was in the form of an offer.

The Court: She said, "I would like to offer it."

Mr. Dooley: I object on the ground it is hearsay, your Honor, and if it is being offered for the truth of its contents——

The Court: I don't know if it is being offered for the truth of the contents. It is being offered to show the application was made.

Mr. Dooley: Yes, your Honor.

The Court: It is up to the plaintiff to show an application was made and it was denied. Are you willing to stipulate an application was made and it was later denied?

Mr. Dooley: I object on the additional ground——

The Court: Wait a minute. Before you make

Testimony of Lun Hong Quan.)

objection, are you willing to stipulate an application was made and then denied? It is incumbent upon the plaintiff to prove he made an application.

Mr. Dooley: Yes, your Honor.

The Court: And that application was denied, either denied by inaction or denied by positive action on the part of the authorities? [20]

Mr. Dooley: Yes, your Honor. I believe the application itself would be the best evidence.

The Court: You are objecting to the application?

Mr. Dooley: No, I am not, your Honor. I was objecting solely to the introduction of the affidavit. The defendant introduced the entire file to show what took place before the American Consulate and the defendant is still willing to introduce the entire file solely for the purpose of showing what took place, but to pick out a piecemeal portion, merely an affidavit of that file, to show what took place, I believe will give——

The Court: Isn't the rule that the plaintiff can introduce any document in the file, and later, if you want to, if she introduces any document, you can offer the entire file? You can't object to the introduction of a part of the file, but you do have a right to say a part is introduced and you want all introduced.

Mr. Dooley: Yes, your Honor.

The Court: Do you have a right to say, "I object to the introduction of this particular document"?

Mr. Dooley: I believe this particular document, your Honor, is irrelevant and immaterial as far as this case goes, and it is hearsay and self-serving.

(Testimony of Lun Hong Quan.)

The Court: Ordinarily you have got to file an affidavit, isn't that right? [21]

Mr. Dooley: That is the procedure. I don't know of any regulation, though.

The Court: Isn't this the same procedure that has been followed right along?

Mr. Dooley: Yes, your Honor, but the thing that she is complaining about is denial of a passport application.

The Court: Are you willing to stipulate that the plaintiff made an application for a passport?

Mr. Dooley: Yes, I can stipulate that.

The Court: All right. Are you willing to stipulate that the application was denied?

Mr. Dooley: I believe the passport—the reason I say that passport file is the best evidence of what took place——

The Court: I am not asking you that. I am asking you if you are willing to stipulate. If you are willing to stipulate, then we don't have to have the evidence.

Mr. Dooley: I would prefer it go in, your Honor.

The Court: All right. It may be received and marked as Plaintiff's Exhibit 1. That is, it is marked, provided the witness will lay a foundation that that is his signature.

Q. (By Miss Parker): Mr. Quan, I show you an affidavit and ask you if that is your signature on that affidavit? A. Yes.

Q. Is that your photograph, photograph No. 1?

A. Yes. [22]

Testimony of Lun Hong Quan.)

Q. Of whom is photograph No. 2?

A. My boy.

Q. Which boy? A. Quan Yoke Fong.

The Court: It may be received in evidence.

The Clerk: Exhibit 1.

(The document referred to was received in evidence and marked as Plaintiff's Exhibit No. 1.)

Q. (By Miss Parker): Mr. Quan, to your knowledge, did your son, Quan Yoke Fong, file this affidavit with the American Consul?

A. Through the American Consul, you mean?

Q. Did he present this affidavit, to your knowledge?

Mr. Dooley: Object to the question.

The Court: The Court can assume it was presented because it is in the government file. I don't know how it would get there otherwise. You are willing to stipulate, aren't you?

Mr. Dooley: It was presented by someone. Object to the question, however, on the ground it calls for hearsay.

The Court: Sustained. Doesn't the affidavit show a stamp when it was received?

Miss Parker: Yes, it does, your Honor. I will also offer in evidence the application for passport executed by Quan Yoke Fong on May 13, 1952.

The Court: There is no objection, is there? [23]

Mr. Dooley: There is no objection if it is being offered to show what took place before the American Consulate.

(Testimony of Lun Hong Quan.)

The Court: It may be received as Plaintiff's Exhibit 2.

The Clerk: Plaintiff's Exhibit 2.

(The document referred to was received in evidence and marked as Plaintiff's Exhibit No. 2.)

Miss Parker: Your Honor, may I have these photographs marked for identification?

The Court: They may be marked for identification.

The Clerk: Plaintiff's Exhibits 3, 4 and 5 for identification.

Miss Parker: And also this one.

The Court: Exhibit 6 for identification.

The Clerk: 6 for identification.

(The photographs referred to were marked as Plaintiff's Exhibits 3, 4, 5 and 6 for identification.)

Q. (By Miss Parker): Mr. Quan, I will show you Plaintiff's Exhibit 3 for identification and ask you if you can identify the photograph of the persons shown thereon, the person on the left first.

A. My wife.

Q. What is her name? A. Gee Bo Yoke.

Q. The child in the middle?

A. Quan Yoke Fong. [24]

Q. And Quan Yoke Fong is your son?

A. Yes, older son.

Q. Your eldest son? A. Yes.

(Testimony of Lun Hong Quan.)

Q. And the person on the right?

A. That is myself.

Q. Do you recall when that picture was taken?

A. 1937.

Q. About how old was your son at that time?

A. About eight years old.

Q. Do you recall the Chinese date of the birth of your son? A. The Chinese date?

Q. The Chinese date.

A. Well, I can't recall, but I know it is American 1930, February 13.

Q. February 13, 1930? A. Yes.

Q. I show you plaintiff's Exhibit 4 for identification and ask you if you will identify the persons in the photograph. A. Yes.

Q. The lady seated is——

A. My wife, Gee Bo Yoke.

Q. And this photograph? [25] A. Myself.

Q. And do you recall when that photograph was taken? A. When she first came over in 1949.

Q. When she first came to the United States in 1949? A. Yes.

Q. I show you Plaintiff's Exhibit 5 for identification and ask you if you can identify the persons shown in the photograph. The boy on the left?

A. My youngest boy.

Q. Your youngest boy, Quan Yoke Fong?

A. Quan Hang Fong.

Q. Pardon me. The party in the middle?

A. My wife, Gee Bo Yoke.

Q. The party on your right?

(Testimony of Lun Hong Quan.)

A. The oldest boy, Quan Yoke Fong.

Q. Do you know when this photograph was taken?

A. My wife told me about after the war it took at Hong Kong.

Mr. Dooley: I object, your Honor.

The Court: The wife can testify.

Miss Parker: Very well, your Honor.

Q. (By Miss Parker): I show you Plaintiff's Exhibit No. 6 for identification and ask you if you can identify the two persons there.

A. Yes. Left, my youngest boy, Quan Hang Fong. Right, the oldest boy, Quan Yoke Fong. [26]

Q. Do you have knowledge as to when this photograph was taken?

A. I understand it was took in April in Hong Kong when my wife came over that time.

Mr. Dooley: I object, your Honor, and move to strike the answer.

The Court: It may go out.

Q. (By Miss Parker): Where did you get this picture, Mr. Quan? A. My wife brought it over.

Q. Your wife brought it over? A. Yes.

Q. In 1951?

A. No. 1949, she came over. I think maybe my boy did. I am not sure.

Miss Parker: May I offer the photographs in evidence, your Honor?

The Court: They may be received in evidence.

The Clerk: Plaintiff's Exhibits 3, 4, 5 and 6 in evidence.

(Testimony of Lun Hong Quan.)

(The exhibits referred to were received in evidence and marked as Plaintiff's Exhibits 3, 4, 5 and 6.)

Q. (By Miss Parker): Mr. Quan, do you recall in December, 1952, addressing a cable to the American Consul at Hong Kong [27] regarding the application of your son, Quan Yoke Fong?

A. Yes, I did send a wire.

The Court: Will you speak up a little louder, please?

Miss Parker: May I have these marked?

The Court: They may be marked Exhibits 7 and 8.

The Clerk: 7 and 8 for identification.

(The exhibits referred to were marked Plaintiff's Exhibits 7 and 8 for identification.)

Q. (By Miss Parker): Mr. Quan, I show you a copy of a cable addressed to the American Consul General, Hong Kong, dated December 11, 1952, and ask if that is the cable that you sent to the American Consul on that day. A. Yes, I did.

Q. Did you during the same month address a wire to the United States Department of State in Washington, D. C., regarding your son's application for a passport? A. Yes, I did, too.

Q. I show you Plaintiff's Exhibit No. 8, addressed to the United States Department of State, Passport Division, Washington, D. C., dated De-

(Testimony of Lun Hong Quan.)

ember 17, 1952, and ask you if this is the telegram you sent to the Department of State. A. Yes

Q. In your wire of December 17, 1952, to the Department of State in Washington, you stated

“If I have not been advised of favorable [28] decision prior to December 23 will assume application is denied.”

Mr. Dooley: Object, your Honor, to reading the contents of the document before admission into evidence.

The Court: Sustained.

Miss Parker: May I offer these telegrams for admission in evidence?

Mr. Dooley: Object, your Honor, on the ground that they do not constitute the best evidence.

The Court: What is the best evidence?

Mr. Dooley: Well, in the case of one of the telegrams, at least, the best evidence is the original telegram.

The Court: Who has the original telegram?

Mr. Dooley: It is contained in the file.

The Court: Do you say that this is not a correct copy of the original? Which file is it contained in?

Mr. Dooley: The State Department file.

The Court: If we have the original, I think the objection is good. You can introduce the original.

Miss Parker: May I offer the original?

The Court: The original may be received in evidence.

The Clerk: Plaintiff's Exhibit 7.

Testimony of Lun Hong Quan.)

(The document referred to was received in evidence and marked as Plaintiff's Exhibit No. 7.)

Miss Parker: Does the Department file show the original [29] of the telegram sent to the Department of State in Washington?

Mr. Dooley: The Department has no knowledge of the telegram having been sent. The State Department file is there.

The Court: Mr. Dooley, isn't there a presumption that a letter that is mailed is delivered? Doesn't that presumption go along with a telegram?

Mr. Dooley: Your Honor, I am wondering where this copy came from. I would like to ask the witness a few questions concerning it generally.

The Court: Take the witness on voir dire and ask about it.

Voir Dire Examination

By Mr. Dooley:

Q. Mr. Quan, did you prepare this copy?

A. You mean the letter?

Q. Yes. Did you prepare this document which is before you in the form it is in?

A. Well, I talk to my lawyer, and so I sent it out, you know, sent the telegram to the State.

The Court: Who was your lawyer at that time?

Miss Parker?

The Witness: Yes.

(Testimony of Lun Hong Quan.)

The Court: Miss Parker, did you send the telegram?

Miss Parker: I did not send the telegram, your Honor. I [30] prepared the telegram.

The Witness: I talked to her about it.

The Court: Is that a copy of the telegram that you prepared?

Miss Parker: No, your Honor, it is not. I dictated the telegram over the telephone.

The Court: Mr. Dooley, is there a contention of the government that the application was not denied?

Mr. Dooley: No, your Honor.

The Court: The application was filed on May 13, 1952. What is the date of this telegram?

Miss Parker: December 17, 1952.

The Court: Now, the government had from May to December to pass upon this application.

Mr. Dooley: Yes, your Honor.

The Court: Did the government ever pass upon it?

Mr. Dooley: The government, I believe, passed upon the application, but not prior to the time the complaint was filed.

The Court: I have already ruled on that, haven't I? That a failure to act within this period of time is a denial.

Mr. Dooley: Yes, your Honor.

The Court: Are you trying to establish by putting in that telegram that there was a denial?

Miss Parker: I am trying to establish, your Honor, that there was in effect a denial prior to the

(Testimony of Lun Hong Quan.)

time the complaint [31] was filed, because there was no answer to this telegram within the time specified in the telegram. The formal denial, I believe the passport file shows on January 7. Is that correct, Mr. Dooley?

Mr. Dooley: I will check that in just a moment.

Miss Parker: And Mr. Quan wired the State Department on December 17 and asked them about it.

The Court: Let him testify that he wired the State Department. We haven't got that testimony yet. The testimony is you dictated the telegram over the phone.

Direct Examination

(Resumed)

By Miss Parker:

Q. Do you know of your own knowledge that this telegram was sent to the State Department on December 17?

Mr. Dooley: Object on the ground the witness has already indicated he doesn't.

The Court: Overruled.

The Witness: You mean I did send this telegram?

Q. (By Miss Parker): You sent this telegram to the State Department on December 17, 1952?

A. Yes.

Miss Parker: May I offer this in evidence?

Mr. Dooley: Object, your Honor. May I ask one more question? [32]

(Testimony of Lun Hong Quan.)

The Court: Yes.

Mr. Dooley: In what manner did you send this telegram, Mr. Quan? Did you go down to the telegraph office?

The Witness: No. I didn't make up this. A friend of mine made it up for me. I tell him what to do and he make it up.

The Court: Did you actually go down to the telegraph office and send the telegram?

The Witness: A friend of mine went down there.

The Court: You gave it to a friend to send?

The Witness: Yes.

The Court: Objection sustained.

Q. (By Miss Parker): Mr. Quan, was your oldest son, the plaintiff, Quan Yoke Fong, born during your first trip to China or was he born during your second trip to China? A. Second trip.

The Court: Your oldest son?

The Witness: Oldest son, yes.

The Court: And the date of his birth again?

The Witness: 1930, February 13th.

Miss Parker: I have no further questions of this witness.

The Court: I understand that no children were born during your first trip?

The Witness: Right.

The Court: The oldest son was born during your second [33] trip?

The Witness: Yes, sir.

The Court: And your youngest son was born during what trip?

(Testimony of Lun Hong Quan.)

The Witness: Third trip.

The Court: Third trip?

The Witness: Yes.

The Court: Do you want to postpone your cross-examination?

Mr. Dooley: Yes, your Honor.

The Court: You may step down.

(Witness withdrawn.)

Miss Parker: Gee Bo Yoke.

GEE BO YOKE

called as a witness herein by and on behalf of the plaintiff, having been first duly sworn, was examined and testified, through the interpreter, as follows:

The Clerk: Will you take the stand and state your name?

The Witness: Quan Gee Bo Yoke.

Direct Examination

By Miss Parker:

Q. Mrs. Quan, where do you reside?

A. 1600 North Boylston. [34]

Q. Where were you born?

A. I was born KS 30, 2nd month, 5th day.

Q. Where were you born? A. Kowkwong.

Q. That is in China, is it? A. Yes, China.

Q. When were you admitted to the United States?

(Testimony of Gee Bo Yoke.)

A. CR 38, Chinese date, 3rd month, 15th day

Miss Parker: What is the date?

The Interpreter: April 12, 1949.

Q. (By Miss Parker): How were you admitted to the United States at that time?

A. Citizen paper.

Q. Were you admitted as the wife of a citizen of the United States?

A. That's right, the wife of a citizen.

Q. Are you married? A. Yes.

Q. To whom are you married?

A. Quan Lun Hong.

Q. When were you married?

A. Kowkwong, Canton, China, or Kwangtung

Q. The date? A. Chinese date CR 10-6-25

The Interpreter: July 29, 1921. [35]

Q. (By Miss Parker): Do you have any children? A. Two sons.

Q. What are the names of your sons?

A. The big one, the older one, is called Quan Yoke Fong. The second one is Quan Hang Fong

Q. When was your older son born?

A. Chinese date CR 19-1-5.

The Interpreter: February 13, 1930.

Q. (By Miss Parker): Where was your son born? A. Kowkwong Village.

Q. What is the birth date of your younger son?

A. CR 27-4-25.

The Interpreter: May 24, 1938.

Q. (By Miss Parker): Was your husband Quan Lun Hong, in China at the time your first

(Testimony of Gee Bo Yoke.)

son was born? A. Yes.

Q. Was he at home with you in the village?

A. Yes.

Q. Was your husband, Quan Lun Hong, in China when your second son was born?

A. Also at home.

The Court: When your husband was home when your second child was born, how old was your first child at that time?

The Witness: About 9.

The Court: In the village, whose house did you live in? [36]

The Witness: I rented the house.

The Court: Did you rent the same house when your No. 1 son was born?

The Witness: Same.

The Court: Did you live in that house with your No. 1 son from the time the No. 1 son was born until your husband came home in 1937?

The Witness: The same house.

The Court: Did your son live with you?

The Witness: Yes.

The Court: Who else lived in the house with you?

The Witness: Just myself and the son.

The Court: When your husband returned to the United States in 1938, did you still live in that same house?

The Witness: Yes.

The Court: Did you still live in the same house from 1938 until you came to the United States in 1949?

(Testimony of Gee Bo Yoke.)

The Witness: Yes.

The Court: And did your No. 1 son live in the house with you?

The Witness: Yes.

The Court: When you came to the United States in 1949, when you left the family home in the village how old was your No. 1 son?

The Witness: CR 27, which is 1938, after the Japanese [37] invasion of China, I had already moved from the village to Hong Kong.

The Court: Did your No. 1 son go with you to Hong Kong?

The Witness: Yes, together we moved.

The Court: How old was your No. 1 son when you went to Hong Kong in 1938?

The Witness: My son was born 27 CR. He would be about 9 years old then.

The Court: Was your second son born in the village?

The Witness: My second son is the one that was born in CR 27.

The Court: Was he born in the village?

The Witness: After birth, yes, we moved several months after he was born.

The Court: Then after your No. 2 son was born several months later you went to Hong Kong?

The Witness: He was born the 4th month of the Chinese calendar, and I moved at the end of the same year to Hong Kong.

The Court: At the time you moved to Hong Kong, your No. 1 son was how old?

Testimony of Gee Bo Yoke.)

The Witness: We call him around 9 years old.

The Court: When you got to Hong Kong, where did you live?

The Witness: Yick Yum Street, near Happy Valley.

The Court: In a hotel room or house?

The Witness: A flat. [38]

The Court: Did you live in that same flat until you came to the United States?

The Witness: Yes.

The Court: Did your No. 1 and No. 2 sons live with you?

The Witness: Same place.

The Court: When you came to the United States, did you bring your No. 2 son with you?

The Witness: No.

The Court: You left your No. 1 and No. 2 sons in Hong Kong?

The Witness: That's right.

The Court: When you came to the United States, how old was your No. 1 son?

The Witness: In the vicinity of 19, I would say, and now I would call him 26, the oldest son.

The Court: When you came to the United States, you left your oldest son in Hong Kong and he was how old at that time?

The Witness: Chinese date, I came over in CR 38.

The Court: When you came to the United States in CR 38, how old was your No. 1 son then?

(Testimony of Gee Bo Yoke.)

The Witness: I have been here seven years already. I call him around 26 Chinese date.

The Court: Now?

The Witness: Now.

The Court: How old was he when you left Hong Kong? [39]

The Interpreter: She can't figure it.

The Witness: I have been here seven years and I call him 26 years old now, and when I came, he was around 19 Chinese.

The Court: How old was your No. 2 son at that time?

The Witness: About 12.

The Court: Then you lived with your No. 1 son from the time he was born in the village until you came to the United States, a period of about 19 years?

The Witness: That's right.

Q. (By Miss Parker): Mrs. Quan, I show you Plaintiff's Exhibit 2, application for passport, and ask you if you can identify the photographs on the back of the passport.

A. This is my oldest son, No. 1 son.

Q. I show you Plaintiff's Exhibit 3 and ask you if you can identify the person on the left, the lady on the left.

A. This is I.

Q. And the little boy sitting in the middle?

A. This is my son.

Q. Which son, Mrs. Quan? A. No. 1 son.

Q. And the person on your left?

A. This is my husband.

Testimony of Gee Bo Yoke.)

Q. Do you recall when this photograph was taken, Mrs. Quan?

A. I think it was CR 27. [40]

Miss Parker: What date is that?

The Witness: The time when he went back to China.

The Interpreter: CR 27 would be about '38 or early '39.

The Court: Is that Exhibit 3?

Miss Parker: Yes, your Honor.

The Witness: Excuse me. It was the year when he went home, CR 26, about that time.

Mr. Dooley: Would you translate that?

The Interpreter: CR 26 would be about 1937 or early 1938, first month in 1938.

The Court: At the time that picture was taken, how old was your No. 1 son?

The Witness: About 8, what you call around 8. Either 8 or 9 years old.

The Court: Was that picture taken in the village?

The Witness: In the village.

The Court: That picture was taken before you went to Hong Kong?

The Witness: Not yet, yes.

The Court: Not yet had gone to Hong Kong?

The Witness: Not yet had gone to Hong Kong.

Q. (By Miss Parker): I show you Plaintiff's Exhibit 4 and ask you if you can identify the persons in that photograph.

(Testimony of Gee Bo Yoke.)

A. This one sitting down is myself. This is my husband. [41]

Q. Do you recall when this picture was taken?

A. The year that I came over here, CR 33, about 1949.

Q. I show you Plaintiff's Exhibit 5 and ask you if you can identify the persons in that photograph. Who is the smaller boy on the left?

A. My little boy.

Q. The person in the middle?

A. This is I.

Q. The one on the right?

A. My older boy.

Q. Do you recall when that picture was taken?

A. About CR 36, before I came to the United States. It was taken in Hong Kong.

Q. I show you Plaintiff's Exhibit 6 and ask you if you can identify that.

A. Picture of my two boys.

Q. The one on the left is which boy?

A. The left side is my younger boy. The right side is the older boy.

Q. Do you know when this photograph was taken?

A. At the time when my little boy came to the United States. It was taken at the airport in Hong Kong.

The Court: When did your little boy come to the United States?

The Witness: CR 40, 1951 American date. I

Testimony of Gee Bo Yoke.)

think he [42] arrived here around the end of July of 1951.

Miss Parker: I have no further questions of this witness.

The Court: Well, before we proceed with any cross-examination, we will take the morning recess. We will recess until 20 minutes after 11:00.

(Recess.)

The Court: You may proceed now.

Miss Parker: Will you mark this exhibit?

The Court: It may be marked the next exhibit.

The Clerk: Plaintiff's Exhibit 9 for identification.

(The exhibit referred to was marked as Plaintiff's Exhibit No. 9 for identification.)

LUN HONG QUAN

Recalled as a witness by and on behalf of the plaintiff, having been previously duly sworn, was examined and testified further as follows:

Direct Examination

(Continued)

By Miss Parker:

Q. Mr. Quan, I show you United States individual income tax returns for the years 1941 to 1954, inclusive, and ask you if these are your file copies of your federal income tax returns filed for those years? A. Yes. [43]

Miss Parker: If the Court please, I would like

(Testimony of Lun Hong Quan.)

to introduce this Exhibit 9 as one exhibit, the income tax returns for the years 1941 through 1954.

The Court: Does it show he claimed No. 1 son as a dependent?

Miss Parker: Yes, it does, your Honor.

Mr. Dooley: Objection, Your Honor, on the ground that the copies are not the best evidence. The originals may be obtained at the request of the taxpayer duly authenticated by the Internal Revenue.

Miss Parker: If I may answer Mr. Dooley, if he has ever tried to get any income tax returns back of four years, he will find the government doesn't keep them.

The Court: Are these true and correct copies of the returns filed?

The Witness: Yes.

The Court: Objection overruled.

Mr. Dooley: I have an objection on another ground. They are self-serving documents.

The Court: Overruled.

The Clerk: Plaintiff's Exhibit 9.

(The exhibit referred to was received in evidence and marked as Plaintiff's Exhibit No. 9.)

Miss Parker: May I also ask permission of the Court to withdraw these at the conclusion of the case? [44]

The Court: They may be withdrawn.

Mr. Dooley: That is at the conclusion of the appeal?

The Court: Yes, at the conclusion of the case.

Testimony of Lun Hong Quan.)

The case is not over with until an appeal has been determined, or a writ of certiorari has been denied if it is asked for in the Supreme Court.

Q. (By Miss Parker): Mr. Quan, I show you the original of a cable addressed by you to the American Consul at Hong Kong, December 12, 1952, and ask you if you received any reply to this cable. A. No.

Miss Parker: I have no further questions, your Honor.

Mr. Dooley: Your Honor, at this time, the defendant renews the motion to dismiss the action for lack of jurisdiction, and in support of the motion the defendant would like to offer in evidence the entire certified passport file of the Department of State for the purpose of showing the action taken by and before the American Consulate.

The Court: I have already ruled on that and I won't presume it is necessary to rule again.

Mr. Dooley: I understand from Mrs. Smith that the file should be reoffered in evidence at the trial.

The Court: It is being reoffered for a restricted purpose only?

Mr. Dooley: Yes, for the purpose of showing the action [45] taken before the American Consul.

The Court: It may be received for that purpose only.

The Clerk: Exhibit A.

(The exhibit referred to was received in evidence and marked as Government's Exhibit A.)

(Testimony of Lun Hong Quan.)

Mr. Dooley: I would like the record to show that the file, including the exhibits introduced by plaintiff from that file, belong to the Department of State, and the defendant would like to be able to withdraw that.

The Court: At the conclusion of the case, such may be the order.

Mr. Dooley: The defendant offers in evidence in support of its motion a certified statement from the Department of State concerning the processing of passport applications at the American Consulate in Hong Kong as Defendant's Exhibit B.

Miss Parker: I object to that, your Honor.

The Court: Overruled. It may be received in evidence.

The Clerk: Exhibit B.

(The exhibit referred to was received in evidence and marked as Government's Exhibit B.)

Cross-Examination

By Mr. Dooley:

Q. Mr. Quan, in what village were you born?

A. Ping On Village, Kowkwong. [46]

Q. On what date was that?

A. 1899, November 7.

Q. When you went to China in 1921, were you still living in Ping On Village? A. Yes.

Q. When you left China in 1922, were you still living in Ping On Village? A. Yes.

Testimony of Lun Hong Quan.)

Q. When did you move from Ping On Village to Kowkwong Village?

A. Well, we moved after we got married in 1921.

Q. In 1921. Then you weren't living in Ping On Village when you returned to the United States in 1922, were you?

A. In Kowkwong, yes.

Q. You were living in Kowkwong?

A. Yes.

Q. In what village were you married?

A. In Ping On.

Q. Did you own a home in Ping On Village?

A. My home?

Q. Did you own a home in Ping On Village?

A. Yes.

Q. Did you own a home in Kowkwong Village?

A. Yes.

Q. How far is Ping On Village from Kowkwong Village? [47]

A. About, shall I say 8 miles.

Q. Eight American miles?

A. Yes, around that. I really don't know exactly.

Q. But that is your estimate?

A. Yes.

Q. How long after your marriage did you move to Kowkwong Village?

A. About two months.

Q. How large is Kowkwong Village?

A. Oh, I would say about—you mean how big population?

Q. Withdraw the question. How many houses, approximately, does Kowkwong Village have?

A. Oh, about 50,000 people.

Q. About what?

A. 50,000 population.

Q. 50,000 population.

A. About.

(Testimony of Lun Hong Quan.)

Q. Do you know where Toy Shan City is located?

A. What city?

Q. Toy Shan.

A. In English. I don't know.

Q. Toy Shan.

A. That is far away. I have never been there.

Q. You have never been to Toy Shan or Toy San? How far away is that from Kowkwong Village? [48]

A. From Toy Shan?

Q. Yes.

A. I don't know, because I have never been there.

Q. How far is Canton from Kowkwong Village?

A. Well, my—about 60 miles, I guess. I really don't know exactly.

Q. In what direction is Canton from Kowkwong Village?

A. Direction?

Q. Yes. A. I think it is south.

Q. Canton is south of Kowkwong Village?

A. No. Kowkwong is south of Canton.

Q. Did you ever travel from Kowkwong Village to Canton?

A. I did a couple of times, I think. I don't remember.

Q. How did you go? A. By boat.

Q. On your trip to China in 1929, did you stay in the village? Did you stay in Kowkwong Village during the entire time you were in China?

A. Yes.

Q. You didn't visit any of the nearby villages?

A. No.

Testimony of Lun Hong Quan.)

Q. You were present when Quan Yoke Fong was born, is that correct? A. Yes, sir. [49]

Q. What time of the day was he born?

A. What day, you say?

Q. What time of the day?

A. In the evening, 7:00 o'clock, around there, bout.

Q. About 7:00 o'clock? A. Yes.

Q. Did you have a doctor in attendance?

A. Yes.

Q. Was there a nurse in attendance?

A. No nurse.

Q. Was he born at home? A. Home.

Q. After Quan Yoke Fong was born, how long did you remain in the village?

A. About four months.

Q. After you left the village, where did you go?

A. I come back to the United States.

Q. When was the next time that you saw Quan Yoke Fong? A. '37, 1937.

Q. Where was it you saw him then?

A. In Kowkwong.

Q. That was during your next trip to China, is that right? A. Yes, third trip, 1937.

Q. How old was Quan Yoke Fong at that time? [50] A. 8 years old.

Q. Where did you live at that time during that trip? A. In 1937?

Q. Yes. A. In Kowkwong.

Q. Did you live in the same house?

A. Yes.

(Testimony of Lun Hong Quan.)

Q. Did you own that house? A. Yes.

Q. When did you first purchase that house?

A. You mean——

Q. The house in which you lived during 1937?

A. The address you mean?

Q. No. When did you first buy that house?

A. Oh, buy that house? Oh, 1930 I moved down there in—'29. I think it was. I don't remember 1922.

Q. 1922. From whom did you buy that house?

A. Oh, some people own.

Q. How many persons lived in this house in 1937 while you were in China?

A. Me and my wife and my oldest boy, Yoke Fong.

Q. While you were in China in 1929 to 1930, who lived in the house? A. 1929 to 1930?

Q. 1929 to 1930, who lived in the house? [51]

A. Me and my wife.

Q. How many rooms did this house have?

A. Two.

Q. What did you use those rooms for in 1937?

A. In 1937? One bedroom—use for what?

Q. One bedroom. What was the other room?

A. Dining room.

Q. Dining room? A. Yes.

Q. Didn't have a kitchen?

A. Got a kitchen in the back.

Q. Was this a one-story house?

A. One-story house.

Q. In 1937, what was the color of this house?

(Testimony of Lun Hong Quan.)

A. Gray.

Q. In the bedroom in 1937, were there any windows? A. You mean—I don't understand.

Q. Were there any windows in the bedroom?

A. Windows?

Q. Yes. A. Yes.

Q. How many windows?

A. Two windows.

Q. In the bedroom. In the dining room, were there any windows? [52] A. Two windows.

Q. Two windows in the dining room. In the kitchen, were there any windows? A. One.

Q. Was there a skylight in the house?

A. No.

Q. What kind of floor, what was the floor of the house made of?

A. Some kind, not exactly brick, but bigger square, big square brick.

Q. In 1937, what color was the floor?

A. Red.

Q. Did you ever move to Hong Kong?

A. Yes.

Q. You were in China at the time that you moved to Hong Kong? A. Yes.

Q. How far is Hong Kong from Kowkwong Village?

A. Gee, I couldn't tell you how far, but we take a boat—let's see. Seven hours, around there, I guess.

Q. Who went along with you at the time that you moved to Hong Kong?

(Testimony of Lun Hong Quan.)

A. My wife and Quan Yoke Fong.

The Court: When you went down to Hong Kong from the village, at that time was your No. 2 boy born? [53]

The Witness: No. 2? Let's see. Yes.

The Court: How old was he?

The Witness: Oh, about two or three months.

The Court: Then you went down to Hong Kong with your wife, your No. 1 and No. 2 boy?

The Witness: Yes.

Q. (By Mr. Dooley): In what direction is Hong Kong from Kowkwong Village?

A. Well, I couldn't say which, because you got to go through, oh—I really don't know south or west, because you take the river boat.

Q. Why did you leave the village to go to Hong Kong? A. I did not get that, sir.

Q. Why did you leave the village, Kowkwong Village, to go to Hong Kong?

A. Why? Well, because I am going back to the states and my family follow me to Hong Kong at that time.

The Court: Was this during the war?

The Witness: Before the war.

The Court: How about the Japanese war?

The Witness: At that time I was here and they live in Hong Kong at that time.

The Court: When you left the village to go to Hong Kong, was that during the Japanese war?

The Witness: Oh, yes. [54]

The Court: It was?

(Testimony of Lun Hong Quan.)

The Witness: Yes. There was bombing, you know, there was bombing at that time, you know. Not all the time, but planes coming in.

Q. (By Mr. Dooley): Were they bombing Kowkwong Village?

A. Well, they didn't bomb, but the plane passed by there that time when I left there.

Q. Where did you move to in Hong Kong?

A. In Happy Village.

Q. What was the address?

A. Yick Yum Street, 20, No. 20.

Q. Was that a house, or what were you living in there? A. Third floor.

Q. Did you own the building? A. No.

Q. You rented? A. Yes.

Q. How many rooms were there on the third floor that you were renting?

A. Living room, bedroom, and kitchen in back.

Q. Were there any windows in the living room in this apartment?

A. Not apartment, just a floor, you know, one floor, I mean.

Q. In the living room on the floor you lived on, were [55] there any windows? A. No.

Q. No windows?

A. Window in the front of the building, I mean wide open, the front of the building is.

Q. And in the bedroom, were there any windows?

A. No.

Q. In the kitchen?

(Testimony of Lun Hong Quan.)

school is, is not long school, and he went to Song Lon school at that time.

Q. Do you have any brothers or sisters, Mr. Quan? A. Me?

Q. Yes. [58]

A. Yes. I had a brother, but he passed away.

Q. What was his name?

A. Quan Son Hong.

Q. When did he pass away?

A. Oh, I don't remember. 1927 or 1928. I don't remember.

Q. Was he older or younger than you?

A. My old brother.

Q. How much older than you was he?

A. He was about seven or eight years older than I.

Q. Did he marry prior to his death?

A. I did not understand.

Q. Did your older brother, Quan Son Hong, marry before his death? A. Yes.

Q. Did he have any children?

A. He got two. He got a boy here and a daughter.

The Court: A boy here in the United States?

The Witness: Yes, a daughter and a boy in the United States.

Q. (By Mr. Dooley): How many children did he have?

A. He had three boys and two girls. I don't remember.

Q. When you went to China in 1929, was your

(Testimony of Lun Hong Quan.)

brother's wife in China at that time, your older brother's wife? A. 1929? [59]

The Court: That is your second trip.

The Witness: No. They was over here.

Q. (By Mr. Dooley): His wife was over here, too? A. Over here in the United States.

The Court: Mr. Dooley, are you going to start an impeachment now?

Mr. Dooley: Well, I don't have but one or two small matters. I was more or less trying to get a picture of the situation.

The Court: I mean if you are going to go to a new subject, we better recess until this afternoon.

Mr. Dooley: Yes, your Honor.

The Court: It is now 12:00 o'clock. We will take our recess until 2:00 o'clock this afternoon.

(A recess was taken to 2:00 p.m.) [60]

Tuesday, June 1, 1955, 2:00 P.M.

LUN HONG QUAN

The witness on the stand at the time of recess, having been heretofore duly sworn, was examined and testified further as follows:

Cross-Examination

(Continued)

By Mr. Dooley:

Q. Mr. Quan, after you left Ping On Village in 1922, did you ever move back to Ping On Village? A. No.

(Testimony of Lun Hong Quan.)

Q. Is your answer no? A. No.

Q. When you returned to the United States in 1938, do you recall giving a statement before the immigration authorities? A. You mean——

Mr. Dooley: I withdraw that question. Will the clerk please mark this document for identification?

The Court: It may be marked for identification Exhibit C.

The Clerk: C for identification.

(The document referred to was marked Government's Exhibit C for identification.) [61]

Q. (By Mr. Dooley): Mr. Quan, I show you Defendant's Exhibit C for identification and ask you, is this your signature? A. Yes.

Q. Did you make that statement on or about the date it bears, July 22, 1938?

A. Yes, I think so.

Q. I refer you, Mr. Quan, to the statement on here:

“How many times have you been married? Give names of wives, dates of marriage, kind of feet, and whether living or dead?”

And then the statement on there:

“Once, Jee Shue, June 25, 1919, natural feet, now living, Ping On Village, Gow Gong, Nam Hoy, China.”

Did you give that answer to that?

A. Maybe I did. I don't remember. It is so long.

Q. I refer you also, Mr. Quan, to the next question:

(Testimony of Lun Hong Quan.)

“Give names, sex, age, date of birth, and present location of each,” referring to the previous question, “How many children have you ever had?”

“Quan Yoke Fong, 8 months, January 15, 1930, location Ping On Village.”

Was that your answer or statement that you gave the Immigration Service?

A. Maybe I did.

Q. I refer you also to the next one, “Quan Hung Fong, [62] age 1 month, sex M, birth date April 25, 1938, location Ping On Village.”

Was that the information you gave the Immigration Service?

A. Maybe at that time I did. I don't remember.

Mr. Dooley: Your Honor, the defendant offers this in evidence as Defendant's Exhibit C.

The Court: It may be received in evidence.

The Clerk: Exhibit C.

(The document referred to was received in evidence and marked as Defendant's Exhibit C.)

Q. (By Mr. Dooley): Mr. Quan, this morning you testified concerning the trip from Kowkwong Village to Hong Kong. As a matter of fact, you didn't go to Hong Kong, did you, with your wife and children? A. You mean——

Q. In 1938.

A. In 1938—well, at that time I don't remember if we went to go on—on my way to the United States?

(Testimony of Lun Hong Quan.)

Q. That is correct.

A. Yes, we went down there together, I think.

Q. You did go together? A. I think so.

Q. As a matter of fact, Mr. Quan, you have never seen your wife's home in Hong Kong, have you? [63]

A. Well, we were trying to get a place there because I only stayed there not very long on my way back here.

Mr. Dooley: May I have this marked?

The Court: It may be marked Exhibit D for identification only.

The Clerk: D for identification.

(The document referred to was marked as Defendant's Exhibit D for identification.)

The Court: Before you go to Exhibit D, I want to ask this witness relative to Exhibit C. You say this is your signature?

The Witness: Yes, that is my signature.

The Court: Did you write this other in the exhibit? Is this your writing up here?

The Witness: No.

The Court: I notice under the date of April 25, 1938, is in parentheses CR-27-4-25. Do you know whose writing that is?

The Witness: Not mine.

The Court: It is not yours?

The Witness: No.

The Court: You don't know who put in CR 27-4-25?

(Testimony of Lun Hong Quan.)

The Witness: No. I didn't write anything there except my signature.

The Court: Just the signature? [64]

The Witness: Yes.

Q. (By Mr. Dooley): Mr. Quan, did you read that document before you signed it, referring to Defendant's Exhibit C?

The Court: You can read English?

The Witness: A little, but at that time I didn't read it very well because, you know, they asked me something and told me to sign it and I did.

The Court: This is 1938?

The Witness: Yes, way back there.

The Court: They just asked you to sign it and you signed it?

The Witness: Yes.

Q. (By Mr. Dooley): Now, Mr. Quan, I will call your attention to Defendant's Exhibit D, and to page 16 of that exhibit, which purports to be testimony given by you before the Immigration Service. I call your attention to a question appearing at the bottom of page 16, which reads as follows:

"Were you at home at the time your wife moved from Gow Gong City to Hong Kong?"

"A. No, I was here, in Los Angeles."

Was that question asked you and was that the answer you gave?

A. Well, at that time I don't remember. Maybe I did. I really don't remember exactly that long.

Q. I am going to call your attention to another question, [65] on page 17 of this exhibit.

(Testimony of Lun Hong Quan.)

“Q. Have you ever been to your wife’s address in Hong Kong? A. No.”

Was that question asked you and was that your answer?

A. I can’t remember whether I did or not at that time.

Q. I ask you now, Mr. Quan, have you ever been to your wife’s address at Hong Kong?

A. Well, as to whether at that time when——

The Court: The question is, have you ever been to your wife’s address at Hong Kong?

The Witness: Well, I have been there.

The Court: At any time?

The Witness: I tried to rent the place there. That is when I been there.

The Court: Did you rent the place?

The Witness: Yes. We tried looking for a place to get in there because—yes, we move in there, see. We been there. I think I been there.

Q. (By Mr. Dooley): So you have been to your wife’s place in Hong Kong? A. Yes.

Q. Was your wife with you at the time?

A. Yes. [66]

Q. Were your children with you at the time?

A. Yes.

Q. Now, Mr. Quan, you returned to the United States July 22, 1938, did you not?

A. Yes, I come back that time.

Q. And your wife moved to Hong Kong in 1939, did she not? A. I don’t remember.

Q. I am going to call your attention to another

Testimony of Lun Hong Quan.)

Question asked you before the Immigration Service and ask you whether the question was asked and whether this was the answer you gave:

“Q. How long did your wife continue to reside at the house at No. 10 Moon Ming Hong Street, Gowkong City?

“A. We lived there until about June, 1939.”

Was that question asked you and was that the answer you gave?

A. You mean my answer that time?

Q. Yes.

A. Maybe I did. I don't remember that long. They asked me a lot of questions there.

Q. Mr. Quan, you testified this morning that you owned your home in Kowkwong City, did you not?

A. Well, not exactly, because I suppose make arrangements [67] to pay \$25 a month.

Q. So you didn't own your home in Kowkwong City?

A. At that time I forget. I was going to pay every month, so I didn't pay up that time, so I guess you can put it that way.

Q. Did you not testify this morning that you purchased your home in 1922 in Kowkwong City?

A. Yes, we moved down there.

Q. Did you not testify that you purchased your home in 1922 in Kowkwong City?

A. You mean own the home?

Q. That is correct.

A. Well, first I tried to buy him. I pay so much month. I can't keep continuing to pay, so——

(Testimony of Lun Hong Quan.)

Q. So you didn't own your home in Kowkwong City? A. Not exactly.

Q. You were renting, is that correct?

A. If I pay up to a certain year, I own it, but I didn't pay up to certain year.

Q. So you were renting, is that it?

A. Yes.

Q. Who was the doctor that attended your first son's bith? A. A lady doctor.

Q. Was there a doctor who attended your second son's [68] birth? A. Yes.

Q. Was it the same doctor?

A. Same doctor.

Q. You owned a home in Ping On Village, did you not?

A. Yes, my father's home at Ping On, the first one, yes.

Q. You left the home in Ping On Village and went to Kowkwong City? A. Yes.

Q. What did you do with the home in Ping On Village?

A. Just leave it there. We didn't do anything.

Q. You didn't sell it? A. No.

Q. Were you paying rent at Ping On Village?

A. Which one?

Q. You owned the home in Ping On Village, is that it? A. Yes.

Q. And you began to pay rent at Kowkwong City? A. Yes.

Q. Now, in the home in Kowkwong City in 1937

Testimony of Lun Hong Quan.)

When you were there, were there any photographs in the living room? A. You mean pictures?

Q. Yes.

A. Yes, we hang a few pictures there.

Q. Were there any photographs of you? [69]

A. Yes.

Q. That was in the living room, is that correct?

A. Yes.

Q. How large a picture was that?

A. Oh, shall I say some small, some big ones, snapshots, about six or seven inches long, I think.

Q. Was that in the living room all while you were in China from 1937 through 1938?

A. Yes, sir.

Q. And that was hanging on the living room all? A. Hanging on the wall, yes.

Q. Where was your wife born, Mr. Quan?

A. Hot Low Ping.

Q. Where was that located with respect to Ping On Village?

A. Quite a way. Right near Kowkwong. It was more closer to Kowkwong than to Ping On.

Q. How far was it from Kowkwong Village?

A. Oh, four or five miles, I think, I guess.

Q. In what direction was it from Kowkwong Village?

A. West—northwest, I think.

Q. Now, after your return to the United States in 1930, Mr. Quan, did your wife write to you?

A. Yes.

Q. How often did your wife write to you? [70]

(Testimony of Lun Hong Quan.)

A. I don't remember. Maybe every month, every two months.

Q. Did she continue to write to you every month or every two months up until 1937 when you returned to China? A. Yes.

Q. Do you have any of those letters, Mr. Quan?

A. I am sorry, I don't, no.

Q. Did you write to your wife between 1930 and 1937? A. Did I write to her?

Q. Yes. A. Letter, you mean?

Q. Yes. A. Yes, I did.

Q. How often did you write to your wife during that period?

A. Well, I can't remember. Maybe a month or two months, sometimes, you know, maybe three weeks. I couldn't remember that.

Q. After you returned to the United States in 1938, did your wife write to you? A. Yes.

Q. How often did your wife write to you?

A. Well, when she feel like, sometimes a few weeks, sometimes a month.

Q. Did she continue to write to you every few weeks or [71] a month between 1938 and 1949, when she came to the United States?

A. No. 1938 to 1939, I didn't hear from her. Well, 1940—say '41, when the war started, she write, see, from Hong Kong, and until 1945 I didn't hear from her.

Q. Then after 1945, did you begin hearing from your wife again? A. I did not get that.

Q. After 1945, did you begin hearing from your

Testimony of Lun Hong Quan.)

wife again? A. Yes.

Q. How often did you hear from her between 1945 and 1949?

A. Every two months anyway, I send money back there.

Q. Do you have any of those letters?

A. I don't think so.

Q. You stated you sent money to your wife. Was that between 1945 and 1949? A. Yes.

Q. How often did you send money?

A. Three or four times a year.

Q. How would you send this money?

A. Go in the bank and buy a check.

Q. Cashier's check?

A. Well, you can say that, yes. [72]

Q. Between 1930 and 1937, did you send any money to your wife? A. Yes.

Q. How often did you send money to your wife during that period?

A. Three or four times a year.

Q. Did you get any kind of receipt for the money that you sent to your wife from 1930 to 1937?

A. I don't think so. The only thing, I buy a check and just mail the check.

Q. Where would you buy these checks?

A. Bank of America.

Q. Always at the Bank of America?

A. Not—well, yes, most of them.

Q. Where was this bank located between 1931 and 1937? A. International Branch.

Q. And 1945 to 1949?

A. Same, International Bank of America.

(Testimony of Lun Hong Quan.)

Q. Located at Los Angeles? A. Yes.

Q. Did you send any money to your wife between 1940 and 1945?

A. No. Let's see. 1941, say 1941—yes, at that time I couldn't locate her.

Q. Did you send any money to your children between 1940 [73] and 1945?

A. Most money I sent direct to her.

Q. So on your income tax return you merely claim your children as dependents during that year, is that right? A. Yes.

Q. Your wife came to the United States in 1949, did she not? A. She did, yes, 1949.

Q. How old was your No. 1 son at that time?

A. 1949? You say 1949?

Q. That is correct. A. 21.

Q. Is it necessary, Mr. Quan, for you to count in order to ascertain the age of your No. 1 son?

A. Well, I got to figure a certain year. You mean now I count?

Q. Yes, as you were counting. Is it necessary for you to count?

A. I don't want to answer the question wrong.

Q. How much older is your No. 1 son than your No. 2 son? A. Eight years.

Q. In 1949, did you make any effort to bring your No. 1 son to the United States?

A. In 1949? No, not that time. [74]

Q. Did you make any effort to bring your No. 2 son to the United States in 1949? A. No.

(Testimony of Lun Hong Quan.)

Q. Why did you not attempt to bring them to the United States in 1949?

A. Well, the reason is because in three or four years they lose all that time during the war, and we wanted them to go to Chinese school and English school for a few years.

Mr. Dooley: Your Honor, defendant offers in evidence Defendant's Exhibit D, that portion of the statement previously read from this exhibit.

Miss Parker: I beg your pardon? I am sorry, Mr. Dooley.

Mr. Dooley: Defendant offers in evidence Defendant's Exhibit D for the portion of the statement previously read from that.

Miss Parker: I object to anything from that unless you are going to put in the whole statement.

Mr. Dooley: The defendant offers in evidence the entire statement.

The Court: You have no objection to the entire statement?

Miss Parker: Put in the whole statement, put in the whole immigration file.

Mr. Dooley: The defendant offers the entire immigration file in evidence. [75]

The Court: It may be received.

The Clerk: Exhibit D.

(The file referred to was received in evidence and marked Defendant's Exhibit D.)

The Court: Exhibit D for Identification was only one part.

(Testimony of Lun Hong Quan.)

The Clerk: He said to mark the file, Your Honor.

The Court: All right, that is in evidence as Exhibit D. May I suggest if you are putting in the immigration file that the entire file, which includes Exhibit C, be put into evidence?

Miss Parker: Yes. I will stipulate to the entire file going into evidence, Your Honor.

Mr. Dooley: Yes, Your Honor.

The Court: The entire file may be admitted as Exhibit C.

Mr. Dooley: Exhibit C was another file.

The Court: No. It was marked before.

The Clerk: The whole file will be C in evidence, then.

(The file referred to was received in evidence and marked Defendant's Exhibit C.)

Q. (By Mr. Dooley): In your trip from Kowkwong Village to Hong Kong, Mr. Quan, how did you travel? A. By boat.

Q. You, your wife and two children took the boat, is that correct? [76]

A. Well—yes. We went up together.

Q. How long did it take you?

A. About seven hours. I don't remember exactly the time.

Q. How old was your No. 2 son at that time?

A. At what time?

Q. At the time you made the trip to Hong Kong?

A. Only a few months old.

Testimony of Lun Hong Quan.)

Q. What is the birth date of your No. 2?

A. 1938, May 24.

Mr. Dooley: No further questions. Oh, your honor, I do have a few more questions.

Q. You testified, I believe, this morning that during your second trip to China, that you remained in the village throughout the period of time, is that correct? A. What year is that?

Q. That is 1929 to 1930. A. Yes.

Q. You didn't leave the village at all?

A. No.

Q. You didn't visit any neighboring village?

A. Not exactly. I don't remember that time. I don't remember that.

Q. Now, your No. 2 son came to the United States in 1951, is that correct? [77]

A. Yes, sir.

Q. Did you make any effort to bring your No. 2 son to the United States then? A. No.

Q. Why did you not make any effort to bring your No. 1 son to the United States at that time?

A. Well, he didn't finish school back there, that was one reason, and in 1951 I wanted to bring the younger son in because of new regulations after 16 years old, he can't come over, so I wanted to bring him over first.

Q. How old was your No. 2 son in 1951?

A. 1951?

Q. Yes. A. 12 years old.

Mr. Dooley: No further questions.

(Testimony of Lun Hong Quan.)

Miss Parker: Would you mark this next for identification?

The Court: It may be marked for identification Exhibit 10.

The Clerk: Exhibit 10 for Identification.

(The exhibit referred to was marked as Plaintiff's Exhibit No. 10 for Identification.)

Redirect Examination

By Miss Parker:

Q. Mr. Quan, on Defendant's Exhibit C, which is a statement [78] which you signed dated July 22 1938, in which is listed the name of your wife and your two children, do you recall whether these statements were asked you in Chinese or in English?

A. In Chinese.

Q. The questions were asked you in Chinese?

A. Yes.

Q. Did you state that this date was in your handwriting? A. No.

Q. That is not in your handwriting?

A. No.

Q. Nothing on the statement is in your handwriting other than the signature at the bottom?

A. Only the signature.

Q. Mr. Quan, I show you a statement dated July 9, 1930, and ask you if that is your signature?

A. That is my signature.

Q. Is any of the other writing on that statement yours other than your signature?

Testimony of Lun Hong Quan.)

A. Only the signature.

Q. None of the rest is in your handwriting, is that correct?

A. That's right.

Miss Parker: I will offer this in evidence as plaintiff's exhibit next in order. [79]

Mr. Dooley: The defendant objects to that document going in, your Honor, because it is only self-serving, a prior consistent statement. The defendant does not offer it for the purpose of impeachment.

The Court: Mr. Dooley, there are two questions for the Court to decide. First, whether or not the plaintiff is the blood son of this witness.

Mr. Dooley: Yes, your Honor.

The Court: And then the next question to decide whether or not the applicant is the party who was born as the blood son of this witness.

Mr. Dooley: Yes.

The Court: Now, that's all. You produced so-called discrepancies on matters that do not bear upon this question at all. They are collateral. The only reason they are admissible is to test the credibility of the witness, that's all. But I am interested in all these documents that have been introduced, because it states time and time again that this witness and the alleged wife were married and they had two children, and it gives the date when the first child was born and where. They are all in agreement. There isn't any question in my mind that there was a valid marriage. There doesn't seem to be any dispute as to that.

I don't think there is any question here that there

(Testimony of Lun Hong Quan.)

were two children born as a result of that marriage. We are [80] primarily interested in this case in the No. 1 child.

Now, all through this record, every time the father has made a report, why, he gives the name of the No. 1 child, where it was born, and the date of the birth, all in accord. There is no dispute, no discrepancy, as far as the records of the government are concerned.

The only purpose of this being admitted in evidence is that it is just another statement, another time when the witness gave the name of the No. 1 child and the date of birth. It is cumulative, that's true.

Mr. Dooley: That's another reason, your Honor, and it is being objected to as self-serving.

The Court: Overruled. It may be admitted in evidence.

The Clerk: Exhibit 10.

(The document referred to was received in evidence and marked as Plaintiff's Exhibit No. 10.)

Q. (By Miss Parker): Mr. Quan, with respect to this house that this morning you testified you were renting, and this afternoon you stated you paid \$25 a month—strike that.

This morning you testified you purchased the house. This afternoon you stated you paid \$25 a month. Were you buying this house on a time payment contract, such as we refer to a time payment contract in the United States?

(Testimony of Lun Hong Quan.)

Were you buying the house at so much a month and paying it like rent? [81]

Mr. Dooley: Object, your Honor, on the ground that the question is leading and suggestive.

The Court: It is leading and suggestive. If we didn't have leading questions in a lot of these Chinese cases, we never would get the testimony. Overruled.

Miss Parker: Would you read the question, please?

(Question read.)

The Witness: First I want to buy it, but I didn't want to pay all the money then, and I just make arrangement with the fellow on it, and I pay him so much a month on a certain day, and the house belongs to me.

Q. (By Miss Parker): Was there any down payment made on the house?

A. I pay him \$25 a month.

Q. You paid him a straight \$25 a month, and at the end of a certain period of years, if you kept up the payments, the house would be yours, is that correct? A. Yes.

Miss Parker: I have no further questions.

Mr. Dooley: That's all.

The Court: You may step down.

(Witness withdrawn.)

The Court: Call in the other witness. [82]

GEE BO YOKE

recalled as a witness herein by and on behalf of the plaintiff, having been previously duly sworn, was examined and testified further, through the interpreter, as follows:

Cross-Examination

By Mr. Dooley:

Q. Where were you born, Mrs. Quan?

A. Kowkwong, Hok Low Village, or Town.

Q. How far is Hok Low Village from Kowkwong Village?

A. It is a part of Kowkwong Village.

Q. How far is Hok Low Village from Ping On Village?

A. Don't know the exact distance, but it take at least an hour to walk there.

Q. In what village were you married, Mrs. Quan?

A. Ping On Village. That is my husband's side, where my husband's family reside.

Q. When did you leave Ping On Village, or did you and your husband live in Ping On Village at any time?

A. I think about a month or two, we lived there.

Q. That was after your marriage?

A. Yes.

Q. Then you moved to Kowkwong Village, is that correct?

A. Ping On, also. Ping On and Hok Low Villages are all within Kowkwong Village, the larger village.

(Testimony of Gee Bo Yoke.)

Q. Ping On and Kowkwong are all part of the same village? [83]

A. It is a small section of the village. They also call it village, too.

Q. So you moved from one portion of the village to another, is that it? A. That's right.

Q. Where did you live in Kowkwong Village?

A. In Hok Low Town. I was from Hok Low Village, my maiden home, in other words.

Q. In Kowkwong Village, where did you live? What was your address in Kowkwong Village?

A. I was from the Hok Low Village married into the Ping On Village in Kowkwong.

Q. Was there a separate village, Kowkwong Village? A. Kowkwong is like a district.

Q. It is not a village at all?

A. They call it Kowkwong Village, also.

Q. But you did move from Ping On Village to Kowkwong, did you not, village or district or section?

A. After I married, I moved to Moon Ming Hong.

The Interpreter: It could be translated into small street or alley.

The Witness: At Kowkwong.

Q. (By Mr. Dooley): At Kowkwong?

A. Yes.

Q. How many rooms did the house have that you lived in? [84]

A. One room and one bedroom.

Q. Did you have a kitchen?

(Testimony of Gee Bo Yoke.)

A. Yes, a small kitchen.

Q. Now, how long did you live at that place?

A. About two months after marriage, I moved to this home until CR 27.

The Interpreter: CR 27 would be 1938 or early 1939.

Q. (By Mr. Dooley): What time in 1938 or early 1939 did you move from Kowkwong?

A. The end of the year.

Q. That would be November or December?

A. According to Chinese calendar, I think it is either the 10th or 11th month.

The Interpreter: Tenth month would embrace part of November and December, two-thirds of December. The eleventh month would cover the balance of December and major part of January of 1939.

Q. (By Mr. Dooley): Your husband was not in China at the time that you moved, was he?

A. At the time when we were seeking for an apartment or flat, he was with us, but when my permanent stay began at the Hong Kong home, he was not there.

Q. Has your husband ever been to your home in Hong Kong? A. He has seen it. [85]

Q. Now, when you moved, when your husband and you were seeking an apartment, seeking a home, who went with you?

A. Just the two of us.

Q. You didn't carry your children along?

A. I can't recall exactly how we went, but we went searching.

Testimony of Gee Bo Yoke.)

Q. You don't remember whether you carried our children along or not?

A. I am not very sure whether I brought the children with me.

Q. Were your children still in Kowkwong Village?

A. I don't remember where I placed them. It has been some time ago.

Q. After you searched for the place in Hong Kong, did you go back to Kowkwong Village?

A. Yes.

Q. And then moved back again, is that it?

A. Yes. I returned to Hong Kong again after I procured the more important things from the village home.

Q. On the second trip, you brought your children with you, is that correct?

A. That's right.

Q. How long did you remain in Hong Kong after you moved there in 1938, the latter part of 1938 or the early part of 1939? [86]

A. By CR 30, Hong Kong was lost, in other words Japanese took over.

Mr. Dooley: Will you translate CR 30 into English? That would be 1941, I believe.

The Interpreter: CR 30 would be 1941 to 1942.

The Witness: Then CR 31, I went to Woo Chow or Ng Chow and took refuge there.

Q. (By Mr. Dooley): How long did you remain in Woo Chow?

(Testimony of Gee Bo Yoke.)

A. Until CR 35, I returned to Hong Kong.

The Interpreter: Which is 1946 or early 1947?
CR 35 is 1946 to 1947.

Q. (By Mr. Dooley): So from 1942 up until 1946 or 1947, you were living in Ng Chow?

A. Yes.

Q. After you moved back to Hong Kong, did you ever leave Hong Kong again?

A. No, until I came here.

Q. Did you ever live in Macao?

A. Half a year.

Q. When did you live in Macao?

A. CR 30, Hong Kong was lost. CR 31, about the sixth month or so, I went to Macao. About the 11th or 12th month of the same year, I went to Ng Chow.

Q. So you lived in Macao before you lived in Ng Chow?
A. Yes. [87]

Q. Did Quan Yoke Fong ever attend school in China?

A. Yes, in Kowkwong, about two years.

Q. When did he first start going to school in Kowkwong?
A. About seven years old.

Q. And that was in what year?

A. I know that at seven he started school, but I can't tell you the year.

Q. Was your husband in China at the time Quan Yoke Fong started school?

A. No, not when he started school.

Q. Did Quan Yoke Fong go to any other school?

A. First in Kowkwong, study there a couple of years, and then he study in Hong Kong.

Testimony of Gee Bo Yoke.)

Q. How long did he study in Hong Kong?

A. Five or six years.

Q. Did he go to the same school all during the five or six years in Hong Kong?

A. Two schools he attended in Hong Kong. The first is Chi Hung. The second one is Poi Chung.

Q. At the time he attended the Chi Hung school, was he living at home or at the school?

A. He returns home at night.

Q. How long did he attend Chi Hung?

A. I think about three years.

Q. At the time he was attending Poi Chung school, was he [88] living at home or at the school?

A. Living at home. There is a chance for him to stay at the dormitory sometimes, too, while he was at Poi Chung, and he comes home often, too.

Q. Did he stay at the dormitory most of the time?

A. He comes home sometimes, but he spent quite some time at the dormitory at school.

Q. During what years did he attend Poi Chung school?

A. I can't recall exactly. As far as my figuring is concerned, I think approximately from CR 35, 36, 37, he was at Chi Hung. 38 and 39 and later, he was attending Poi Chung, and then came my time to go to the United States.

Q. Now, at the time you came to the United States in 1949, you left your two sons in Hong Kong, is that true? A. Yes, at Hong Kong.

Q. And with whom did you leave them, if any-

(Testimony of Gee Bo Yoke.)

one? A. To a servant.

Q. How long had you known this servant?

A. At the time I went down to Hong Kong I start, I hired her. Since CR 35, I hired her to help the family.

Q. Did your husband own the home that you lived in in Kowkwong Village?

A. You mean the one at Moon Ming Hong?

Q. Yes.

A. As far as I know, I thought we rented it, because I [89] pay money every month.

Q. Did your husband own the home at Ping On Village? A. I think it is my husband's.

Q. What did your husband do with the home in Ping On Village when you moved to Kowkwong?

A. Left it there, just left the home there. No one living there.

Q. At the time that your husband was in China from 1937——

The Court: Mr. Dooley, we are leaving the home, so we will take our afternoon recess. We will now recess until 20 minutes after 3:00.

(Recess.)

Miss Parker: If the court please, counsel for the government has said he would permit me to put on a witness, the witness who sent the telegram so that the gentleman won't have to wait and can go back to his office, if that is agreeable.

The Court: All right.

HUAN LIN CHENG

called as a witness herein by and on behalf of the plaintiff, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Miss Parker:

Q. Mr. Huan, of what country are you a [90]
citizen? A. United States.

Q. Do you know Mr. Quan Lun Hong?

A. Yes.

Q. I show you Plaintiff's Exhibit No. 1, which is an affidavit of Quan Lun Hong, to which is attached an affidavit of Huan Lin Cheng, and ask you if that is your signature?

A. Yes, that is my signature.

Q. Mr. Huan, did you on or about the middle of December send a telegram to the United States Department of State at the request of Mr. Quan Lun Hong? A. Yes, I sent it for him.

Q. Just a moment, please, Mr. Huan. I show you Plaintiff's Exhibit 8 for identification and ask you if you prepared this telegram and if you sent that?

A. Yes. I typed the thing up and then I asked the Western Union boy to come to the house to pick it up to send it. I have the office at 1057 South San Pedro, Room 210, I have the office up there.

Miss Parker: May I offer this in evidence, if the court please?

The Court: Do you want to ask some questions?

Mr. Dooley: Yes, your Honor.

(Testimony of Huan Lin Cheng.)

Cross-Examination

By Mr. Dooley:

Q. Is this your typing here? [91]

A. Yes, this is my typing. I typed this out.

Q. You gave it to a Union boy?

A. Yes, at Maple and Twelfth office. I went up there and tried to get the original one, but the man told me after six months they are destroyed.

Q. Was this your telephone number?

A. No, Mr. Quan's telephone number. They use it for collection.

Q. Did you type the time filed on here?

A. Yes.

Q. Had it been filed at the time you typed this on here? A. I beg your pardon?

Q. Had your telegram been filed at the time you typed this date on the exhibit?

A. The same day I typed it, the same day I send it, so I put the day on it.

Q. This boy that you gave the telegram to, do you know what he did with it?

A. I am pretty sure he send it to the office after collecting from Mr. Quan's telephone number.

Q. You don't know that he did?

A. Well, Mr. Quan told me he paid the bill already for the amount what they charged.

Q. But it is only from what Mr. Quan told you?

A. Yes. I ask him, "Charge you for the number on there?" [92] And he said, "Charge my phone

(Testimony of Huan Lin Cheng.)

number," and I am pretty sure the telephone called him up the same day, you know, "How about the telegram sent out charged to your phone?" And he said, "All right," and send the bill to him.

Q. You didn't take this telegram to the telegraph office yourself?

A. No. Always the boy come to pick them up.

Mr. Dooley: No further questions. Defendant objects, your Honor, to this document going in because it seems as if this witness gave it to someone else to take down to the telegram office and it is not the best evidence that a telegram was sent, especially as to its contents.

The Court: Did you give this to a Western Union messenger boy?

The Witness: Yes, messenger boy.

The Court: Overruled. It may be received in evidence.

The Clerk: Exhibit 8.

(The document referred to was received in evidence and marked as Plaintiff's Exhibit No. 8.)

The Court: May this witness be excused?

Mr. Dooley: No further questions.

The Court: You may be excused.

(Witness excused.) [93]

GEE BO YOKE

recalled as a witness by and on behalf of the plaintiff herein, having been previously duly sworn, was examined and testified further, through the interpreter, as follows:

Cross-Examination

(Continued)

By Mr. Dooley:

Q. Mrs. Quan, at the time your first son was born, was there a doctor present? A. Yes.

Q. At the time your second son was born, was there a doctor present? A. Midwife doctor.

Q. What time of the day was your first son born? A. About 7:00 o'clock in the evening.

Q. What time of the day was your second son born? A. 8:00 or 9:00 o'clock in the evening.

Q. I show you Plaintiff's Exhibit 2 and refer you to the photograph on the reverse side of this form and ask you, do you know when that photograph was taken?

A. At the time when he made application.

Q. Were you present at the time that photograph was taken?

A. I think I was over here that time.

Q. You were in the United States?

A. Yes. [94]

Q. It is only from what you heard that you know when it was taken, is that correct?

A. At the time when application was made, they requested that this picture be taken.

(Testimony of Gee Bo Yoke.)

Q. Quan Yoke Fong told you when it was taken, is that correct?

A. I don't know exactly how I can tell you how it happened, but it was understood they were supposed to make these pictures for the application, and that is the time when I was in the United States.

Q. I show you Plaintiff's Exhibit No. 3 and ask you where was that picture taken?

A. Taken in Kowkwong.

Q. Was that taken in a photograph shop?

A. Yes.

Q. And Plaintiff's Exhibit 4, where was that taken?

A. It was taken over here in my home in Los Angeles.

Q. In the United States? A. Yes.

Q. Plaintiff's Exhibit No. 5, where was that taken? A. In Hong Kong.

Q. And when was that?

A. Either CR 36 or 37; prior to my coming to the United States, anyway.

Q. Was that taken in a photograph shop? [95]

A. Yes, it was.

Q. I show you Plaintiff's Exhibit 6. Do you know where that was taken?

A. It was taken at the time when the youngest son was leaving at the airport.

Q. That was taken in Hong Kong?

A. Yes.

Q. You were in the United States at the time?

A. That's right, yes.

Mr. Dooley: No further questions.

Miss Parker: I have no further questions of this witness, your Honor.

(Witness excused.)

The Court: You might bring the father in, because the father understands English.

Miss Parker: There is one further question I would like to ask the father, also, your Honor.

The Court: All right. You can tell her she can stay in the courtroom.

LUN HONG QUAN

recalled as a witness herein by and on behalf of the plaintiff, having been previously duly sworn, was examined and testified further as follows: [96]

Further Direct Examination

By Miss Parker:

Q. Mr. Quan, I show you Plaintiff's Exhibit 8, which you testified you asked a friend to send to the Department of State for you, telegram dated December 17, 1952, and ask you whether prior to December 23 you received any notice from the Department of State.

A. I didn't receive any.

Miss Parker: That's all.

The Court: Any further questions?

Mr. Dooley: No further questions.

(Witness excused.)

The Court: I am not going to be able to render a decision this afternoon, but I would like to call attention to certain things I find in the record.

I notice in Exhibit A, which is the Department of State file, the finding of the American Vice Consul upon the examination of the applicant, this statement:

“No discrepancies or contradictions were made during the interview.”

If this file contains the entire interview, then it was a very sketchy interview. They certainly didn't go into many questions relative to the claim of the applicant.

Also, the report says: [97]

“It is interesting to note that the known descendants descending from the paternal grandfather consists of eleven males and one female. This high percentage of males is a vivid reminder of the numerous frauds found in these cases.”

Under the Mar Gong case, we cannot consider the question that in other cases there have been indications of fraud. Each case must stand upon the testimony that is introduced in the case.

Then the finding is that:

“From the above blood data”—it gives the blood tests and the results—“Quan Yoke Fong could not be the blood son of his alleged American citizen father.”

Then the last finding is:

“In view of the foregoing, it is the opinion of the undersigned that the applicant is attempting to perpetrate fraud, and that the affiant and his alleged

wife show a lack of good faith in the presentation of this claim, by claiming a fraudulent child.”

It seems to me that the immigration authorities or the vice consul are basing the denial solely upon the blood tests, and the blood tests are not before us. We have the results here, but we don't have any testimony from any medical doctor as to what they mean. I don't know what they mean.

So we are going to have to wait until we get [98] the blood tests and have some medical testimony as to what they mean.

I also found somewhere in the record that there doesn't seem to be any family resemblance between the plaintiff and his alleged parents. I am very much interested in Exhibit 10 and the application that was filed when the father came to this country. It contains a photograph of the father, the father of the plaintiff and the grandfather of the plaintiff. It seems to me, looking at Exhibit 3, which shows the plaintiff at five or six years of age—I don't remember how old he was in Exhibit 10 which shows the picture of the grandfather—that there is a very marked family resemblance. The family resemblance isn't between the child and the father, but the child and the grandfather.

I wish you would look at this, Mr. Dooley. It seems to me there is a very marked family resemblance.

Mr. Dooley: There seems to be, your Honor.

The Court: I am showing Miss Parker, too, that there is a very marked resemblance between the boy and the grandfather.

Mr. Dooley: There probably is some relationship.

The Court: I don't think there is any question that the alleged father and the alleged mother were married. In Exhibit D relative to the application of the mother, I find this in the record:

"In view of the above it is the belief of the examining [99] inspector that the applicant Gee Bo Yoke has established beyond a reasonable doubt that she is in fact the wife of Quan Lun Hong, as claimed, and as such is entitled to the Section 4-A status under which she is applying for admission into the United States."

Now, the examiner didn't require the mother to establish by a preponderance of evidence that she was the wife, but evidently required her to establish beyond a reasonable doubt. The Circuit has said that is not the proper measure, that they do not have to establish beyond a reasonable doubt, although it was done in this case.

I think there is no question that the father and mother were married and no question that the father was an American citizen. It has been established beyond a reasonable doubt in the minds of the immigration authorities that the mother was the wife of the alleged father. I don't think there is any question that two children were born to this marriage.

The fact of the matter is that immediately after the birth of the plaintiff, the father came back to the United States, and at that time reported the birth of a male child by the plaintiff's name and gave the

proper date, that is, CE 19-1-15. That date has been constant through all the records of the immigration service.

There is no question in my mind that there was a marriage here and that there was born as an issue of that marriage [100] a child by the name of Quan Yoke Fong.

The picture that I have called your attention to Exhibit 3, indicates to my mind that the picture of the boy is Quan Yoke Fong and the grandson of the party that I called your attention to a minute ago the father of the plaintiff's father.

The only question is whether or not from the time the plaintiff was born until the time he made application to come to the United States, there had been a substitution of parties, whether or not the plaintiff had died and somebody had taken his place. There is nothing in the evidence to indicate a substitution. There is nothing to show the plaintiff is not the party he alleges to be, and if it wasn't for this blood test, the court would have no problem relative to the granting of a judgment.

However, we have the question of the blood test. I don't know how important it is going to be. I don't know what weight it will have.

We have in this case the testimony of the mother. In these cases the mother's testimony when it is available is the most important testimony we can get. She testified the plaintiff was her son and she lived constantly with that boy until she came to the United States, and according to the testimony when she came to the United States the boy was

about 19 years of age. It will take some pretty good testimony to [101] refute the claim of the mother.

There are discrepancies, yes, but as I pointed out in other cases, I would be more suspicious of a case in which there were no discrepancies than if there were discrepancies. But there is no discrepancy relative to the question at issue, that is, was there a marriage? Was there a child issue of that marriage by the name of Quan Yoke Fong?

Now, I don't think there is any discrepancy relative to those two points. The only discrepancies that have been introduced in this case are discrepancies which would go to the credibility of the witnesses. There is nothing in the record to indicate to me that the mother is not telling the truth.

However, I am going to wait until I have received the blood test and the report. In the meantime, I would like to give you some homework.

I would like to have a brief filed relative to the weight to be given to blood tests. Assuming that the blood tests show that the plaintiff could not be the blood son of the father, is that infallible? Or is it a presumption, or can it be controverted by other testimony?

The state courts have never adopted the rule that the blood tests are controlling. As far as I know, the federal courts in this district have not adopted that rule. But one of these days we are going to have a case in which the case is [102] going to hinge upon the question of a blood test, and this may be the case. I don't know whether

this is the case or not. This may be the case. But in the meantime I wish you would gather together all the authorities you can as to what weight is to be given the blood test in a paternity case or in a case like this, that is, what weight is to be given in the federal court. I know what the rule is in the state court. But what is the rule in the federal court? What are we supposed to do here? Are we supposed to follow the state rule?

If we followed the state rule, then the blood test even though it is adverse, is not controlling. That is my impression of it. I don't know. I haven't reviewed the subject, but that is my impression, that the blood tests are not controlling.

So I would like, Mr. Dooley, and you will have two or three weeks here, I would like for you to get me that information and file your authorities as soon as you can, so I can read them.

Mr. Dooley: Very well, your Honor.

The Court: And the same for you, Miss Parker. If I have two of you looking at this case from different points of view, I may find out what the law is.

Miss Parker: If the court please, the clerk informs me I did not put the entire immigration file in evidence. I intended to. [103]

The Court: I thought that you did.

Miss Parker: That is what I intended to do. Apparently I only offered the one statement.

The Court: Which one do you want in evidence?

Miss Parker: 10.

The Court: It may be received in evidence.

The Clerk: Exhibit 10.

The exhibits referred to, was referred in evidence and marked as Plaintiff's Exhibit No. 10.

The Court: The matter will stand submitted for it is not submitted yet. After the receipt of the blood and the report of the doctor we will have to have the doctor here to testify what it means. I notice in the Department of State file there was a result of a blood test. There is no statement of a doctor as to what the meaning is. There is a statement by the Consulate General as to what the blood tests mean. The Consulate General says from these blood tests he thinks certain things, but I don't know whether he is qualified to make such a statement. He may be right. I don't know. But I don't think he is qualified to make such a statement.

The matter will be submitted until we receive the blood tests and receive the reports. Then I would like the matter to be set down for a hearing. I would like to dispose of this case before leaving. This court will be taken in August so I would like to dispose of this matter in July if possible. [142] We have 60 days. I don't see why in the world you can't get the reports back from Hong Kong and get the doctor's reports in and have the testimony within the 60-day period.

Mr. Dooley: I feel it can be done from Hong Kong.

The Court: Then that concludes this case for now. [143]

August 16, 1955—10:00 A.M.

The Court: Before you call our other case, there is a matter I want to dispose of in *Quan Yoke Fong vs. Dulles*, No. 14963.

Mr. Dooley: We are ready, your Honor.

Miss Parker: Ready, your Honor.

The Court: I gave you until the 15th to file memorandums. I am not going to continue the matter any further.

Mr. Dooley: The events concerning this affidavit have very recently occurred.

The Court: You may file it if you want.

In this particular case, I continued the case after I took it under submission until the 15th in order to allow the government to produce affidavits relative to certain matters that happened in Hong Kong.

Several weeks ago I wrote a memorandum opinion in regard to this matter. That was before I had received a copy of the Circuit's decision in a recent case. After reading that opinion, I am rather satisfied that the Circuit would eventually rule that blood tests are not available in this kind of a case as evidence for the government.

Consequently, I am going to hold to my original feeling in regard to this case. As I pointed out in the memorandum, if it hadn't been for the request of the government, I [107] would rule from the bench. In the *Fong Sick Lung* case, the Circuit points out that the order must be strictly complied with. In that case, the order didn't follow the statute. In the case at bar, the government didn't follow

the statute. Consequently I am now denying the motion of the government.

Mr. Dooley: Your Honor, may I make two comments upon the events which have subsequently——

The Court: I am sorry, Mr. Dooley. I have got jury trial here and I am going to proceed with the jury trial. I am denying the motion for a supplemental order and I am ordering judgment in favor of the plaintiff.

Mr. Dooley: But your Honor——

The Court: I have here a memorandum in regard to this case that I will file. I have copies for the government and for opposing counsel.

Mr. Dooley: I would like for your Honor, if you would continue this matter——

The Court: I won't continue it any further. As pointed out in my memorandum, this case has been pending three years.

Mr. Dooley: But I believe the matter concerning the blood test in the Fong Sick Lung case is somewhat different from what it is here.

The Court: If this case were being tried now, I wouldn't allow the blood test of the father in evidence, there being [108] absolutely no necessity to get a blood test of the son.

Mr. Dooley: The government will make an offer of proof. The government at this particular stage has actually obtained the results of a blood test of the parents.

The Court: I am sorry, Mr. Dooley. I have ruled.

Mr. Dooley: If your Honor would just hold your opinion for the purpose of permitting the

government to make an offer of proof of the result of the blood test, then the matter could go up to the Circuit and they could determine whether the results of the blood tests which have been obtained pursuant to an order——

The Court: This is not a proper case. Some day you may have a case in which the issue is presented squarely to the Circuit.

Mr. Dooley: The issue is present here.

The Court: The Circuit has side-stepped this issue. They have decided this matter upon a question as to the admissibility of the evidence, not whether the evidence, the blood test, is conclusive or not conclusive.

Mr. Dooley: In the Fong Sick Lung case, your Honor, I would like to point out one distinction.

The Court: Mr. Dooley, I have ruled. The plaintiff is directed to prepare the findings of fact and conclusions of law and the judgment.

Mr. Dooley: But I would like to get the question as to [109] the admissibility in evidence before the Circuit.

The Court: I am sorry, Mr. Dooley.

Call the next case.

Mr. Dooley: Your Honor, I would like to make an offer of proof for the record today.

The Court: I have ruled, Mr. Dooley. I am sorry. Call the next case. [110]

October 3, 1955—10:00 A.M.

The Clerk: No. 9, 14963-HW Civil, Quan Yoke Fong vs. John Foster Dulles, Secretary of State, motion of defendant for new trial.

The Court: How long will this matter take?

Mr. Dooley: It shouldn't take too long.

The Court: What is too long?

Mr. Dooley: Ten or 15 minutes, your Honor.

The Court: Well, let's call the other cases. We can probably dispose of some of the other motions on the calendar and get rid of them.

(Other court matters were taken up.)

The Clerk: No. 9, 14963-HW Civil, Quan vs. Dulles.

Mr. Dooley: Your Honor, in this case we have before the court——

The Court: Is this the one I signed the judgment on just recently?

Mr. Dooley: Yes, your Honor, I believe the judgment was signed.

The Court: Involving the question of failure of the government to comply with the order of court, and then trying to comply with it secondly?

Mr. Dooley: Well, I think the court in its opinion discussed various matters as far as the change in the doctors, and [112] the motion for——

The Court: Mr. Dooley, these matters have to come to an end some time. If they are not terminated by this court, they have to be terminated by the Circuit. We cannot go on and on with these cases. If

really shouldn't have granted an extension of time that you asked for relative to finding out about the payment that had been required of the plaintiff over in Hong Kong. I should have gone ahead and granted the motion then, but you said you wanted to investigate and see whether or not the money was paid, and so forth and so on.

Mr. Dooley: Your Honor, arrangements have been made to reimburse the plaintiff for any——

The Court: But that wasn't the problem. The question that came up was a question whether or not the government had required the plaintiff to make these payments. It wasn't a question of reimbursement, because when I made the order I anticipated that the government certainly wouldn't call upon the plaintiff to bear the cost of these tests.

Mr. Dooley: As soon as they found out about it, arrangements were speedily made, and I understand the American Consul has been authorized now to return to the plaintiff any money that he paid.

The Court: After that decision from the Circuit if I was passing upon a motion for a blood test at this time, I would deny it. Just because there was a blood test taken in this [113] case, if the case came to trial I would feel that the father gave his blood under a misapprehension of fact and law.

Mr. Dooley: That is one point I would like to discuss for a few moments. The father gave his blood. The plaintiff is now complaining about his father giving the blood. But the other case has already decided the father is not in the suit, so what

reason does the plaintiff have to complain, assuming, for instance, it was illegal? What grounds does the plaintiff have to complain about his parents giving blood? In the civil cases—or in the criminal cases dealing with illegal search and seizure, your Honor——

The Court: Mr. Dooley, I was hoping I might get a case to the Circuit in which I could present to the Circuit the question of whether or not a blood test, first would be admissible in federal court and, secondly, whether it would be binding upon the court.

Supposing we had a blood test and it was available. There is no assurance I would allow the government to introduce the results of the test.

Mr. Dooley: Your Honor, we have the blood tests. They have been made. They are available to the court.

The Court: But if I set aside this case and grant a new trial, there is no assurance I would allow the blood tests to be introduced. The plaintiff certainly gave his blood under a misapprehension. [114]

Mr. Dooley: Your Honor, in this case the plaintiff has been tested. The blood of his parents has been tested. We have the results set forth in the affidavit of the laboratory technician. Then I have the affidavit of Dr. Rubinstein who, from an examination of the experience he lists in his affidavit, is well qualified as a hemotologist. He taught hematology for ten years at Columbia University and, as stated in his affidavit, he is willing to come to court and testify. The laboratory technician is willing to come and testify, and Dr. Rubinstein will

testify it is imposible for the alleged father to be the father, acording to the affidavits. We have that evidence in the form of affidavits here that it is impossible for this plaintiff to be a citizen of the United States.

The Court: Suppose we came up to the time of hearing. On one side we have the testimony of the father and mother. On the other side we have the testimony of a doctor. Now, just which one is the court going to believe? Is he going to believe the doctor?

Mr. Dooley: Yes.

The Court: Or the father and mother?

Mr. Dooley: Your Honor asked the question as to whether California law applied or the federal court.

The Court: No, I didn't.

Mr. Dooley: At one time. [115]

The Court: I wanted to know whether or not these tests are admissible in federal court.

Mr. Dooley: Yes, your Honor. They are not only admissible, but they are conclusive or should be.

The Court: There hasn't been a decision in this state which says it is conclusive.

Mr. Dooley: In California we have the——

The Court: I wanted the Circuit to say a blood test was conclusive evidence, but the Circuit side stepped it.

Mr. Dooley: Before the Circuit can rule on the question, a case would have to come up. The question as far as the federal court is concerned has not been ruled on except in the Second Circuit. There

were two cases in my memorandum in the Second Circuit which held they could be conclusive. I think this is an opportune case for that ruling.

What I was referring to was the California law as to the subject matter. In 1952, your Honor, California adopted a statute which in effect said that if there is no disagreement among the experts, the results of the blood test showing nonpaternity is conclusive, and not only that, the statute that California adopted was part of the uniform code that was adopted by the commissioners in 1952, and California adopted the statute in 1953. Under this statute California has changed its laws.

Before that time, under the Chaplin cases and in the [116] Harris cases, California said the court could give whatever weight it saw fit. California reversed its decision and adopted a statute making blood tests conclusive if there is no disagreement among the experts.

I can say, your Honor, from the literature I have read on this subject, I can be sure there will not be any disagreement among the experts as to the meaning of the blood tests in this case. We have the affidavit of Dr. Rubinstein that the father could not be the father of Quan Yoke Fong. We do not believe there will be a dispute as to the meaning of this test.

The Court: That Circuit Court decision also criticized the way an order had been drawn. The order here was rather specific. The order was that the plaintiff present himself on the 9th day of June, 1955, at the office of the American Consul General

where he will be directed to the office of Dr. L. T. Ride, Vice Chancellor, Hong Kong University, and there to furnish and permit said doctor to take a sample or samples of his blood in sufficient quantity so that such blood may be transported to the West Coast Medical Laboratory, and so forth.

The plaintiff appeared according to that order on the 9th day of June. For some unknown reason the order was not complied with.

After the 9th day of June, I don't know how the government [117] got the plaintiff in, I don't know what representations were made to the plaintiff, but they took another sample of blood. They had no order for the second sample of blood.

You understood and you thought it was necessary to have a second order because you asked for a second order, which was denied by the court.

Mr. Dooley: Yes, your Honor. You will notice the plaintiff's affidavit attached to the documents that I attached to this motion shows there apparently was no objection to this. I think the real question, your Honor, since we have the evidence——

The Court: The real question, Mr. Dooley, is you just don't like to give up. You just don't like to quit.

Mr. Dooley: We have a case where it is scientifically impossible for this child to be a citizen of the United States. I would like to read——

The Court: Well, Mr. Dooley, there is no use arguing with me any more. The motion is denied. The Circuit may decide to give you a new trial.

if the Circuit wants to order a new trial, it is out of my hands. But your motion for a new trial is denied.

Court will now stand in recess until 2:00 [118]
'clock.

Certificate

I hereby certify that I am a duly appointed, qualified and acting official court reporter of the United States District Court for the Southern District of California.

I further certify that the foregoing is a true and correct transcript of the proceedings had in the above-entitled cause on the date or dates specified herein, and that said transcript is a true and correct transcription of my stenographic notes.

Dated at Los Angeles, California, this 6th day of December, 1955.

/s/ S. J. TRAINOR,
Official Reporter.

[Endorsed]: Filed January 17, 1956. [119]

Title of District Court and Cause.]

CERTIFICATE BY CLERK

I, John A. Childress, Clerk of the United States District Court for the Southern District of California, do hereby certify that the foregoing pages numbered 1 to 103, inclusive, contain the original

Petition;

Answer;

Notice of Motion to Require Parties to furnish blood sample, etc.;

Notice of Motion to Dismiss;

Order Requiring Parties to Furnish Blood Sample, etc.;

Notice of Motion for Supplemental Order to Require Plaintiff to Furnish Blood Sample;

Affidavit of Quan Lun Hong;

Affidavit of James R. Dooley;

Memorandum;

Findings of Fact and Conclusions of Law;

Judgment Determining American Citizenship;

Notice of Motion for New Trial;

Memorandum in Opposition to Motion for New Trial;

Notice of Appeal;

Order Extending Time to Docket Appeal;

Designation of Record on Appeal;

Stipulation Regarding Exhibits;

and a full, true and correct copy of the Minutes of the Court on

May 16, 1955;

July 18, 1955;

August 16, 1955;

October 3, 1955;

which, together with 1 volume of Reporter's Transcript of Proceedings of May 16, 31, June 1, Aug. 16, Oct. 3, 1955, and Plaintiff's Exhibits 1-10, inclusive, and Defendant's Exhibits A- d, inclusive, in the

above-entitled cause, constitute the transcript of record on appeal to the United States Court of Appeals for the Ninth Circuit, in said cause.

I further certify that my fees for preparing the foregoing record amount to \$2.00, which sum has not been paid by appellant.

Witness my hand and the seal of said District Court, this 24th day of January, 1956.

[Seal] JOHN A. CHILDRESS,
Clerk;

By /s/ CHARLES E. JONES,
Deputy.

[Endorsed]: No. 15006. United States Court of Appeals for the Ninth Circuit. John Foster Dulles, Secretary of State, Appellant, vs. Quan Yoke Fong, Appellee. Transcript of Record. Appeal from the United States District Court for the Southern District of California, Central Division.

Filed January 25, 1956.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for
the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

C.A. No. 15006

JOHN FOSTER DULLES, as Secretary of State

Appellant,

vs.

QUAN YOKE FONG,

Appellee.

APPELLANT'S STATEMENT
OF POINTS ON APPEAL

The appellant Hereby Designates the following
Points on Appeal in the above-entitled matter:

(1) The District Court was without jurisdiction to declare appellee a national or citizen of the United States, since appellee was not denied a right or privilege as a national of the United States upon the ground that he was not a national of the United States prior to the repeal of Section 503 of the Nationality Act of 1940.

(2) The District Court erred in denying appellant's motion to dismiss for lack of jurisdiction over the subject matter and for failure to state a claim upon which relief can be granted.

(3) The District Court erred in its Finding of Fact Number IV.

(4) The District Court erred in denying appellant's motion for supplemental order to require plaintiff to furnish blood sample.

(5) The District Court erred in declaring appellee a national and citizen of the United States of America without receiving and considering available evidence of the results of blood tests of appellee and his alleged parents.

(6) The District Court erred in refusing appellant's offer of proof as to the results of blood tests of appellee and his alleged parents prior to declaring appellee a national and citizen of the United States of America.

(7) The District Court erred in denying appellant's motion for new trial based upon newly discovered and newly obtained evidence consisting of the results of blood tests showing that appellee could not be the son of his purported father.

Dated: This 31st day of January, 1956.

LAUGHLIN E. WATERS,
United States Attorney;

MAX F. DEUTZ,
Assistant U. S. Attorney,
Chief of Civil Division;

/s/ JAMES R. DOOLEY,
Assistant U. S. Attorney,
Attorneys for Appellant.

Affidavit of Service by Mail Attached.

[Endorsed]: Filed February 2, 1956.



No. 15006.
IN THE
United States Court of Appeals
FOR THE NINTH CIRCUIT

JOHN FOSTER DULLES, as Secretary of State,
Appellant,
vs.
QUAN YOKE FONG,
Appellee.

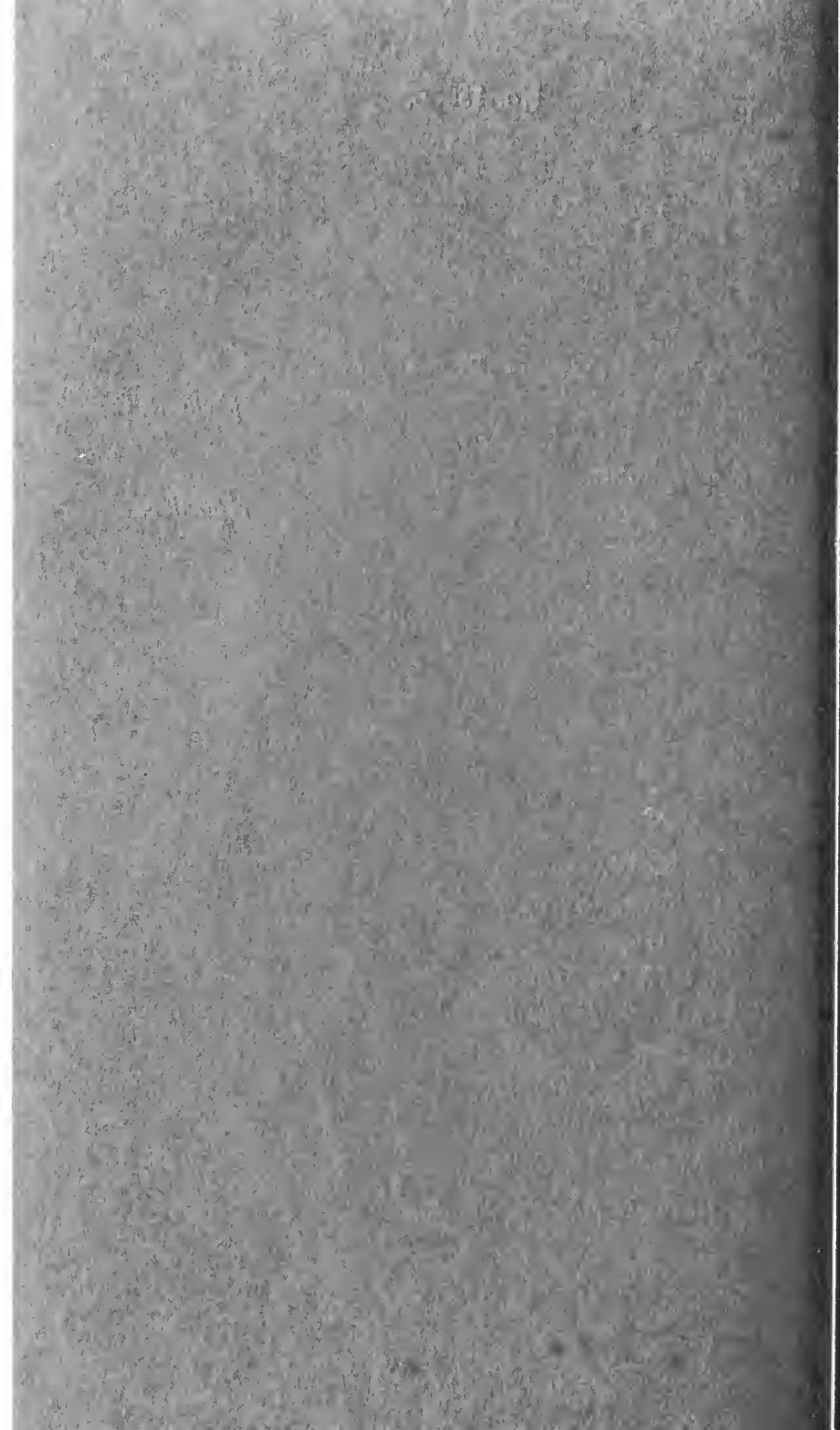
APPELLANT'S OPENING BRIEF.

LAUGHLIN E. WATERS,
United States Attorney,
MAX F. DEUTZ,
Assistant U. S. Attorney,
Chief of Civil Division,
JAMES R. DOOLEY,
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FILED

JUL 18 1956

PAUL P. O'BRIEN, CLERK



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No. 15006.
IN THE
United States Court of Appeals
FOR THE NINTH CIRCUIT

JOHN FOSTER DULLES, as Secretary of State,
Appellant,
vs.
QUAN YOKE FONG,
Appellee.

APPELLANT'S OPENING BRIEF.

Jurisdiction.

Appellee, plaintiff in the Court below, brought action in the District Court, seeking to be declared a national of the United States [R. 3-5].¹ Jurisdiction was invoked pursuant to Section 503 of the Nationality Act of 1940, 54 Stat. 1171-1172, 8 U. S. C. A. §903 [R. 5]. Appellant contends that the Court below was without jurisdiction of the subject matter, since appellee had not been denied a right or privilege as a national of the United States upon the ground that he was not such a national at the time his complaint was filed on December 23, 1952 [R. 5], or before the repeal of Section 503 of the Nationality Act of 1940.²

¹"R" refers to printed Transcript of Record.

²Section 503 was repealed by Section 403(a)(42) of the Immigration and Nationality Act of 1952, 66 Stat. 280, effective December 24, 1952 (See, Sec. 407 of the Immigration and Nationality Act of 1952, 66 Stat. 281).

Since the judgment of the District Court [R. 38-39] was a final decision, this Court has jurisdiction of an appeal from that decision pursuant to 28 U. S. C., Section 1291. However, the jurisdiction of this Court ends if it finds the District Court was without jurisdiction of the subject matter [*United States v. Corrick*, 298 U. S. 435, 440 (1936)].

Statement of the Case.

On December 23, 1952, appellee filed a complaint in the District Court under Section 503 of the Nationality Act of 1940, seeking a judgment declaring him to be a national of the United States [R. 3-5]. He alleged that he was born in China on February 13, 1930, as the lawful issue of the marriage between Quan Lun Hong and Gee Bo Yoke [R. 3]; that his father, Quan Lun Hong, was a citizen of the United States at the time of appellee's birth and had resided in the United States since May, 1915 [R. 3-4]; and that appellee thus acquired United States citizenship at birth pursuant to Section 1993, Revised Statutes of the United States [R. 4].

Appellee's complaint further alleged that he had theretofore filed at the American Consulate General in Hong Kong for an American passport or other travel document to travel to the United States [R. 4], but that the Consulate General had refused to issue to him the passport applied for [R. 4-5]; and that appellant had denied him the right to enter the United States and reside therein as an American citizen upon the ground that he was not a United States national [R. 5].

On May 6, 1955, appellant moved to dismiss appellee's action pursuant to Rule 12(b)(1) and (6) and Rule 12(h), Federal Rules of Civil Procedure, on the grounds

that the court lacked jurisdiction over the subject matter of the action and that the complaint failed to state a claim upon which relief could be granted [R. 13]. In support of this motion there was received in evidence as Exhibit "A" [R. 16, 63] the certified passport file relating to appellee. This file disclosed that appellee's passport application was executed on May 13, 1952; that on November 13, 1952, an American Vice Consul recommended that the application be denied, and that on the same day this recommendation was concurred in by the American Consul; and that the Department of State disapproved appellee's passport application on January 1, 1953. Also received in evidence in support of Appellant's Motion to Dismiss was an authenticated Statement Regarding the Processing of Passport Applications at the American Consulate General in Hong Kong [R. 16, 63, Ex. B]. Appellant's Motion to Dismiss was denied on May 16, 1955 [R. 16, 60-61]. During trial appellant renewed his Motion to Dismiss for lack of jurisdiction [R. 95-96].

Also on May 6, 1955, appellant filed a motion to require appellee and his alleged parents to submit to blood tests under Rule 35, Federal Rules of Civil Procedure [R. 9-12]. An affidavit in support of this motion [R. 10-12] recited among other things that records in possession of appellant showed an incompatibility between appellee's blood grouping and the blood grouping of his alleged parents [R. 11]. This motion was granted [R. 16, 61], and an order was filed requiring appellee, who resided in Hong Kong, B. C. C., to furnish a sample of his blood to be transported to the West Coast Medical Laboratories, Los Angeles, California, for testing, and further requiring appellee's alleged parents to undergo blood tests [R. 16-19].

On March 21, 1955, the case had been continued to July 11, 1955, "for setting for trial" [R. 8]. However, because appellee's alleged mother was "contemplating a trip to Hong Kong" [R. 61], the court set trial for June 1, 1955, in order to obtain her testimony before her departure [R. 61-64]. The testimony of appellee's witnesses was taken on June 1, 1955, with the understanding that a further hearing would be held [R. 140, 145] and that decision would be held in abeyance until the results of blood tests were received [R. 61-64].

On July 1, 1955, appellant filed a motion for a supplemental order to require appellee to furnish a blood sample [R. 20-22]. An affidavit of Albert L. Blifield, clinical laboratory technician employed by West Coast Medical Laboratories, was filed in support of this motion. This affidavit recited, among other things, that the blood of appellee's alleged parents had been tested on June 9, 1955 [R. 22], but that it was impossible to test the sample of appellee's blood which had been shipped from Hong Kong because it was completely hemolyzed upon arrival; that he had recently examined several blood samples shipped from Hong Kong, and that in all cases except two had found the samples in good condition and had tested them for grouping and type [R. 21-22].

On August 16, 1955, the trial court, without a further hearing, denied appellant's motion for a supplemental order to require appellee to furnish a blood sample, and ordered judgment for appellee. The court refused to continue the matter to allow appellant to present evidence of the results of blood tests of appellee and his alleged parents, and further refused to permit appellant to make an offer of proof as to such evidence [R. 147-148].

On September 12, 1955, appellant moved for a new trial on the grounds, *inter alia*, of newly discovered evidence which could not with reasonable diligence have been discovered and produced at the trial [R. 39-57]. On October 3, 1955, this motion was denied [R. 57, 149-155].

Statement of Points.

(1) The District Court was without jurisdiction to declare appellee a national or citizen of the United States, since appellee was not denied a right or privilege as a national of the United States upon the ground that he was not a national of the United States prior to the repeal of Section 503 of the Nationality Act of 1940.

(2) The District Court erred in denying appellant's motion to dismiss for lack of jurisdiction over the subject matter and for failure to state a claim upon which relief can be granted.

(3) The District Court erred in its Finding of Fact Number IV.

(4) The District Court erred in denying appellant's motion for supplemental order to require plaintiff to furnish blood sample.

(5) The District Court erred in declaring appellee a national and citizen of the United States of America without receiving and considering available evidence of the results of blood tests of appellee and his alleged parents.

(6) The District Court erred in refusing appellant's offer of proof as to the results of blood tests of appellee and his alleged parents prior to declaring appellee a national and citizen of the United States of America.

(7) The District Court erred in denying appellant's motion for new trial based upon newly discovered and newly obtained evidence consisting of the results of blood tests showing that appellee could not be the son of his purported father.

Questions Presented.

(1) Do the facts establish the jurisdictional requisite for an action under Section 503 of the denial on the ground that appellee is not a United States national?

(2) Does the savings clause of the 1952 Act permit a suit as to which there was no jurisdiction when Section 503 was repealed to be jurisdictionally revived by virtue of an express administrative denial of the claimed right after the new Act took effect?

(3) Did the District Court err in denying appellant's motion for a new trial?

(4) Did the District Court erroneously prevent appellant from presenting or offering any evidence to show that appellee's blood was incompatible with that of his alleged parents?

(5) Did the District Court err in denying appellant's motion for a supplemental order to require appellee to furnish a blood sample?

Statutes Involved.

Section 1993 of the Revised Statutes of the United States, on February 13, 1930, the alleged date of appellee's birth, provided:

"All children heretofore born or hereafter born out of the limits and jurisdiction of the United States, whose fathers were or may be at the time of their birth citizens thereof, are declared to be citizens of

the United States; but the rights of citizenship shall not descend to children whose fathers never resided in the United States.”

Section 503 of the Nationality Act of 1940, 54 Stat. 1171, 8 U. S. C. A., Section 903, provides in pertinent part:

“Sec. 503. If any person who claims a right or privilege as a national of the United States is denied such right or privilege by any Department or agency, or executive official thereof, upon the ground that he is not a national of the United States, such person, regardless of whether he is within the United States or abroad, may institute an action against the head of such Department or agency in the District Court of the United States for the District of Columbia or in the District Court of the United States for the district in which such person claims a permanent residence for a judgment declaring him to be a national of the United States * * *.”

Section 405(a) of the Immigration and Nationality Act of 1952, 66 Stat. 280, 8 U. S. C. A., note following Section 1101, provides in pertinent part:

“Sec. 405. (a) Nothing contained in this Act, unless otherwise specifically provided therein, shall be construed * * * to affect any prosecution, suit, action or proceedings, civil or criminal brought, or any status, condition, right in process of acquisition, act, thing, liability, obligation, or matter, civil or criminal, done or existing, at the time this Act shall take effect; but as to all such prosecutions, suits, actions, proceedings, statutes, [*sic*] conditions, rights, acts, things, liabilities, obligations, or matters the statutes or parts of statutes repealed by this Act, are unless otherwise specifically provided therein, hereby continued in force and effect * * *.”

I.

The Facts Do Not Establish the Jurisdictional Requirement for an Action Under Section 503 of Denial on the Ground That Appellee Is Not a United States National.

A. Jurisdictional Requisites for an Action Under Section 503.

In *Dulles v. Lee Gnan Lung*, 212 F. 2d 73 (C. A. 9, 1954), this Court laid down the jurisdictional requirements for an action under Section 503 of the Nationality Act of 1940 as follows (p. 75):

“Section 503 of the Nationality Act of 1940, 8 U. S. C. A. §903, did not give any court jurisdiction of any action other than an action instituted by a person *who had claimed a right or privilege as a national of the United States and had been denied such right or privilege by a Department or agency, or, executive official thereof, upon the ground that he was not a national of the United States.*” (Emphasis added.)

There are no presumptions in favor of the jurisdiction of the courts of the United States [*Grace v. American Central Ins. Co.*, 109 U. S. 278 (1883); *Ex parte Smith*, 94 U. S. 455 (1876)]. Consequently, the requisites for jurisdiction as enunciated in *Lee Gnan Lung* must not only be alleged in the pleadings [*Elizarraraz v. Brownell*, 217 F. 2d 829 (C. A. 9, 1954); *Clark v. Inouye*, 175 F. 2d 740 (C. A. 9, 1949)]; but, if challenged in any appropriate manner, must be supported by competent proof [*McNutt v. General Motors Acceptance Corp.*, 298 U. S. 178 (1936); *Ling Share Yee v. Acheson*, 214 F. 2d 4 (C. A. 3, 1954), cert. den. 348 U. S. 873; *Celite Corporation v. Dicalite Co.*, 96 F. 2d 242, 249 (C. C. A. 9, 1938)].

It was therefore incumbent upon appellee to prove that at the time his complaint was filed, he had been denied a right or privilege as a national of the United States upon the ground that he was not a national of the United States.

B. There Was No Express Denial.

Clearly, there was no express denial of appellee's passport application, either at the time his action was instituted on December 23, 1952 [R. 5] or when Section 503 of the Nationality Act of 1940 was repealed on December 24, 1952. Appellee's passport file [Ex. A] discloses that his passport application was executed on May 13, 1952; that on November 13, 1952 an American Vice Consul *recommended* that the application be denied; and that the Department of State disapproved the application on January 6, 1953. Thus, there was no express denial of appellee's passport application until January 6, 1953.

C. There Was No Implied Denial.

The District Court did not find an express denial, but assumed jurisdiction on the ground that the delay in acting upon appellee's passport application prior to the time his action was filed was unreasonable and "a denial of plaintiff's rights and privileges as a national and citizen of the United States" [Finding of Fact IV, R. 37]. This finding, although nominally a finding of fact, is in substance a conclusion of law; and this Court is not bound by the rule that findings shall not be set aside unless clearly erroneous [Rule 52(a), Federal Rules of Civil Procedure], but is free to draw its own conclusions [*Stevenot v. Norberg*, 210 F. 2d 615, 619 (C. A. 9, 1954); *Plumb Tool Co. v. Sanger*, 193 F. 2d 260, 264

(C. A. 9, 1952), cert. den. 343 U. S. 919; *Brown v. Cowden Livestock Co.*, 187 F. 2d 1015, 1017-1018)].

Appellee's passport application was executed on May 13, 1952 [See, Ex. A] and his complaint was filed on December 23, 1952 [R. 5]. Thus, the delay which the District Court found to be unreasonable amounted to only 7 months and 11 days. Even if Rule 52(a) were applicable, in view of the statutory duty imposed upon appellant to make an administrative determination of appellee's nationality prior to issuing a passport; the inability due to appellee's place of birth and prior residence to verify his nationality through official sources; and the congestion of the administrative calendar at the American Consulate at Hong Kong, caused by a deluge of similar applications; the finding of the District Court that a delay of only 7½ months in passing upon appellee's passport application was unreasonable, is clearly erroneous.

The authority to issue passports has been conferred by statute upon the Secretary of State under such rules as might be prescribed by the President (Sec. 1 of the Act of July 3, 1926, 44 Stat. 887, 22 U. S. C. A., Sec. 211a); and Congress has prohibited the issuance of passports to persons other than those owing allegiance to the United States (Sec. 4076, Revised Statutes of the United States, as amended by the Act of June 14, 1902, 32 Stat. 386, 22 U. S. C. A., Sec. 212).³ By Executive Order, the Secretary of State is empowered to "require such additional evidence of citizenship as in his judgment may be

³Of course "alien passports" may be issued (Act of Mar. 2, 1921, 41 Stat. 1217, 22 U. S. C. A., Sec. 227); however, appellee did not apply for a passport as an alien, but as a citizen [R. 23].

necessary to establish the citizenship of an applicant for a passport" (Ex. Order 7856, 22 C. F. R., Sec. 51.65).⁴

The statutes referred to above manifest a Congressional intent that an administrative determination of United States nationality and/or citizenship should precede the issuance of a passport, since granting of passports to persons other than those owing allegiance to the United States is prohibited. Thus, when appellee filed his application for a passport as a citizen, he did not thereby acquire an immediate "right" to the issuance of a passport; nor did he acquire an immediate right to a determination of his claim to citizenship. He was only entitled to have his claim processed in accordance with normal administrative procedures, considering all the facts and circumstances of the case.

Appellee alleged birth on the mainland of China on February 13, 1930 [R. 3]. He had resided at various places in China and in Hong Kong from the date of his birth until his application was filed [See Ex. A]. He did not submit in support of his application a birth certificate or other official documentary evidence, as is normally available in other countries [Ex. B, p. 6]. Because the mainland of China was "closed" to the United States at the time appellee's passport application was filed, it was impossible to verify his name, place of birth, places of residence, and family history from official sources [Ex. B, p. 2]. It was thus necessary for the Consul General to attempt to obtain and evaluate secondary evidence of appellee's citizenship. This was done by requesting the

⁴Ex. Order 8820, 22 C. F. R. 107.3, authorizes officers of the Foreign Service to issue passports to American nationals pursuant to such provisions of Ex. Order 7856 as may be applicable to the issuance of passports abroad.

District Director, Immigration and Naturalization Service, Los Angeles, California, to blood test appellee's alleged parents [see, Letter dated July 21, 1952, contained in Ex. A], by having appellee blood tested [see, Report of Dr. Eric Vio, dated October 21, 1952 contained in Ex. A], and by interviewing appellee [see Interview of October 28, 1952 in Ex. A].

Nor was appellee entitled to priority in the processing of his application, since a large number of similar applications had been filed. Defendant's Exhibit B, an authenticated Statement Regarding the Processing of Passport Applications at the American Consulate General in Hong Kong, discloses that with the closing of the American Consulate General at Canton in 1949, a heaving load of citizenship cases were transferred to Hong Kong [p. 1], that a deluge of applications later descended on the Consulate General at the rate of 150 per month [pp. 1, 3]; that lack of funds, personnel, and office space limited the number of applications which could be processed [pp. 5-6]; that as of September 1, 1952, more stringent examination and investigation procedures were authorized, including the blood-typing of claimants and their alleged parents, since the State Department's review of the citizenship claims passed upon at Hong Kong convinced it that a large number of fraudulent claimants were proceeding to the United States [p. 4]; and that the more detailed examination and investigation of claims and the incidence of court actions requiring work on applications for certificates of identity under Section 503 of the Nationality Act of 1940, slowed down the rate of processing claims [p. 4].

During trial appellee offered evidence that his alleged father cabled the Consulate General on December 11, 1952

and wired the State Department six days later to the effect that unless he was notified prior to December 23, 1952 that the application was approved, it would be assumed that the application was denied [R. 79-84, 133-135, Exs. 7 and 8]. These messages did not create a denial. Appellee had no right by sending them to thus force a preference in the handling of his application over those previously pending in the State Department.

In view of the foregoing, it is submitted that the delay of only seven and one-half months here involved was not unreasonable, and that the conclusion of the District Court to the contrary was clearly erroneous. The decisions which have found an implied denial from delay involved periods of substantially greater length. For example, in *Chin Chuck Ming v. Dulles*, 225 F. 2d 849 (C. A. 9, 1955), an affidavit-application⁵ for passport was filed with the American Consulate General at Hong Kong on September 6, 1951, and a period of 15 months and 16 days elapsed between the date of such filing and the institution of court action. And in *Wong Ark Kit v. Dulles*, 127 F. Supp. 871 (D. Mass., 1955), a period of almost three years elapsed between the date an affidavit was executed by plaintiff's alleged father and the date suit was brought. These decisions not only lack persuasive weight as applied to the facts of the case at bar, but emphasize the fact that a delay of only 7½ months was not unreasonable.

⁵In the present case the affidavit of appellee's alleged father was not filed with the American Consulate General until April 29, 1952 [See, Affidavit in Ex. A]. Thus, even if this affidavit is considered as an application, it would add only 14 days to the period of delay.

II.

The Savings Clause of the 1952 Act Does Not Permit a Suit as to Which There Was No Jurisdiction When Section 503 Was Repealed To Be Jurisdictionally Revived by Virtue of an Express Administrative Denial of the Claimed Right After the New Act Took Effect.

As has previously been shown, appellee has not been denied a right or privilege as a national of the United States upon the ground that he was not such a national, either actually or constructively, when his suit was brought or when Section 503 was repealed. However, his application for passport was expressly denied by the Secretary of State on January 6, 1953. The issue is thus presented as to whether the savings clause contained in the Immigration and Nationality Act of 1952 permitted his suit to be jurisdictionally revived by virtue of the express administrative denial of the claimed right after the new Act took effect. Appellant submits that it did not. This issue was briefed by appellant in the appeal of *John Foster Dulles v. Tam Suey Jin*, No. 14947, and appellant hereby incorporates the applicable portion of its opening brief in that case (pp. 14-24) into the present brief.⁶

⁶A stipulation was approved by this Court permitting such incorporation.

III.

The District Court Erred in Denying Appellant's
Motion for a New Trial.

A. Blood Tests Show That It Is Not Possible for Appellee
To Be the Son of His Alleged Father.

Affidavits filed in support of appellant's Motion for a New Trial show that evidence is available to prove, based upon blood tests made of appellee and his alleged parents that *it is not possible for appellee to be the child of his alleged father*, and that consequently, it was not possible for appellee to have acquired citizenship of the United States at birth pursuant to Section 1993, Revised Statutes of the United States.

The affidavit of Albert L. Blifield, clinical laboratory technician employed by West Coast Medical Laboratories [R. 45-47] discloses that he tested the blood of appellee and his alleged parents with the following results [R. 45-46].

Lun Hong Quan

Blood Group: "AB"

MN Factors: "M" positive
"N" positive

MN Type: Type "MN"

Gee Bo Yook

Blood Group: "B"

MN Factors: "M" positive
"N" positive

MN Type: Type "MN"

Quan Yoke Fong

Blood Group: "O"

MN Factors: "M" positive
"N" negative

MN Type: Type "M"

The affidavit of Dr. Michael A. Rubinstein, hematologist [R. 47-50], states that, based upon the blood tests as set forth above, "*it is not possible for Lun Hong Quan (sic) to be the blood father of Quan Yoke Fong*" [Emphasis added. R. 50]. Both affiants are willing to testify in court concerning the matters set forth in their affidavits [R. 47, 50].

**B. Blood Tests of the A-B-O System Excluding Paternity
Should Operate Conclusively.**

Whether federal or state law governs,⁷ blood tests of the A-B-O system excluding paternity should operate conclusively. The most enlightened judicial thought on the weight to be accorded blood tests excluding paternity is perhaps embodied in the Uniform Act on Blood Tests to

⁷Appellant believes that federal law should govern, notwithstanding the doctrine enunciated in *Erie R. Co. v. Tompkins*, 304 U. S. 64 (1938), 114 A. L. R. 1487, that a Federal court will apply the substantive law of the State wherein it sits [See also, *Klaxon Co. v. Stantor Electric Mfg. Co.*, 313 U. S. 487 (1941); *Guaranty Trust Co. v. York*, 326 U. S. 99 (1940)]. The *Erie* doctrine has generally been limited to cases arising out of diversity of citizenship; and in the interpretation and application of federal statutes, such as the statute here involved, federal rather than local law applies [*United States v. Standard Oil Co.*, 332 U. S. 301 (1947); *Holmberg v. Armbrrecht*, 327 U. S. 392 (1946); *Clearfield Trust Co. v. United States*, 318 U. S. 363 (1943); *Wragg v. Federal Land Bank*, 317 U. S. 325, 328-329 (1943); *Sola Electric Co. v. Jefferson Co.*, 317 U. S. 173, 176 (1942); *D'oench, Duhme & Co. v. F. D. I. C.*, 315 U. S. 447, 455-456 (1942); *Board of Comm'rs v. United States*, 308 U. S. 343 (1939); *In re Pittsburgh Rys. Co.*, 155 F. 2d 477 (C. C. A. 3, 1946)]. The necessity for uniformity in cases involving United States citizenship [See, *Clearfield Trust Co. v. United States*, *supra*, for another situation where uniformity was required] would seem to lend support to the position that federal rather than state law governs the weight to be accorded blood tests excluding paternity in the case at bar. It would be anomalous if a child born abroad would be able to establish his United States citizenship in a state where blood tests excluding paternity were not conclusive, while not being able to do so in a state where such tests are given conclusive effect.

Determine Paternity, adopted by the National Conference of Commissioners on Uniform State Laws in 1952 at San Francisco. This Act makes the results of blood tests excluding paternity conclusive when there is no dispute among the experts employed as to the results. The language used by the commissioners in their prefatory note to the Act is illuminating [See 9 Uniform Laws Annotated, 1955 Cumulative Annual Pocket Part, pp. 13-14]:

“As to the make-up of the blood, the testing process is reasonably simple. It is practically the same thing in which the 11 million or more men were tested in determining blood types in the service. It is the same kind of test made of the blood of donors to the Red Cross and hospital blood banks. Consequently, *this is one of the few classes of cases in which judgment of court may be absolutely right by use of science.* In this kind of a situation it seems intolerable for a court to permit an opposite result to be reached when the judgment may scientifically be one of complete accuracy. *For a court to permit the establishment of paternity in cases where it is scientifically impossible to arrive at that result would seem to be a great travesty on justice.* In the scientific area there are relatively few situations where the results may be made absolutely conclusive. In many cases where medical expert testimony is used the testimony is really based on expert opinion only, but in the blood test to determine non-paternity by classification into groups, while the opinion of a doctor may be involved, it is the kind of an opinion on which experts will not differ. *A statute upon the subject ought to take into account this situation of certainty and make the medical testimony final as against all other testimony when non-paternity is scientifically proved.*” [Emphasis added.]

Even before the adoption of the Uniform Act, however, the most enlightened state court decisions and legal writers had taken this view [*Jordan v. Mace*, 144 Me. 351, 69 A. 2d 670 (1949); *Saks v. Saks*, 71 N. Y. S. 2d 797, 189 Misc. 667 (1947); *Cunco v. Cuneo*, 96 N. Y. S. 2d 899, 198 Misc. R. 240 (1950); *Cortese v. Cortese*, 10 N. J. S. 152, 76 A. 2d 717 (1950); *Clark v. Rysedorph*, 118 N. Y. S. 2d 103, 281 App. Div. 121 (1952); Schatkin, *Disputed Paternity Proceedings* (2d Ed., 1947); Britt, "Blood-Grouping Tests and More 'Cultural Lag,'" 22 Minn. L. Rev. 836, 837 (1938); Maguire, "A Survey of Blood Group Decisions and Legislation in the American Law of Evidence," 16 So. Cal. L. Rev. 161, Note 39 Calif. L. Rev. 277 (1951); Note, 34 Cornell L. Q. 72 (1948); Note, 26 Calif. L. Rev. 456 (1938)].

In *Ross v. Marx*, 90 A. 2d 545, 21 N. J. Super. 95, the Essex County Court, New Jersey, held, in a paternity case, that a blood test exclusion is decisive of the issue of paternity. In awarding judgment to the defendant, the court stated (p. 546):

"It is universally accepted in medical and scientific fields that the result of a blood grouping test disproving paternity or, to use the language of the statute, indicating definite exclusion of parentage, is not an expression of opinion upon which experts can differ but, rather, is the *statement of a scientifically established fact*. It is a scientifically established fact just as it is a scientifically established fact that the world is round. *As such it should be accepted by the courts of law*. For a court to declare that these tests are not conclusive would be as unrealistic as it would be for a court to declare that

the world is flat. This a court of law, whose prime function is to ascertain trust and administer justice, should not do.” [Emphasis added.]

In Schatkin, *Disputed Paternity Proceedings* (2d Ed., 1947), an authority often quoted, the author says (p. 184):

“As far as the accuracy, reliability, dependability—even infallibility—of the tests are concerned, *there is no longer any controversy*. The result of the test is *universally accepted by distinguished scientific and medical authority*.” [Emphasis added.]

And in Chapter VIII, “The Unerring Accuracy of Blood Tests,” Schatkin relates that in 656 blood tests made between 1935 and 1945 by order of the Court of Special Sessions in New York City and resulting in 65 exclusions of paternity, every case of an exclusion “was followed by the mother’s subsequent confession, for the first time, of sexual relations with another man about the time she became pregnant.” [2d ed., p. 225.]

In California, the evolution which has taken place in the law concerning the weight to be accorded blood tests which exclude paternity is highly indicative of the most advanced judicial thought. Prior to 1953 these tests were not conclusive. Before then, the rule in California was set forth in *Arais v. Kalensnikoff*, 10 Cal. 2d 428, 74 P. 2d 1043, 115 A. L. R. 163. In that case the defendant was 70 years of age and denied that he had ever had relations with the plaintiff. Both the defendant and his wife testified that he had been impotent for a number of years. On the blood test, an eminent physician of Los Angeles testified that the blood grouping of the child was such that the defendant could not be the father;

and it was unquestioned that the test was fairly and correctly reported. The Supreme Court of California nevertheless permitted the finding of paternity based upon the oral testimony of the mother of the child to prevail. A similar ruling was subsequently made in *Berry v. Chaplin*, 74 Cal. App. 2d 652, 169 P. 2d 442 (1946).

The *Arais* and *Chaplin* cases were severely criticized by both courts and legal writers [*Gilpin v. Gilpin*, 94 N. Y. S. 2d 706, 709, 197 Misc. R. 319, 322 (1950); Schatkin, Disputed Paternity Proceedings (2d Ed., 1947) pp. 197-203; Schatkin, Disputed Paternity Proceedings (3d Ed., 1953); pp. 250-263; Britt, Blood-Grouping Tests and More "Cultural Lag," 22 Minn. L. Rev. 836, 837 (1938); Note, 26 Calif. L. Rev. 456 (1938); Note 34 Cornell L. Q. 72, 78-80 (1948); Note, 39 Calif. L. Rev. 277 (1951).] As a result of such criticism, California in 1953 adopted the Uniform Act on Blood Tests to Determine Paternity [California Code of Civil Procedure, Sections 1980.1-1980.7] almost in its entirety.

Thus, under the present California law, if there is no disagreement in the findings or conclusions of the experts, blood tests excluding paternity are regarded as conclusive. That this was the purpose of the present California law is made evident by the language of the Commissioners on Uniform State Laws in their prefatory note to the Act, commenting upon the *Arais* decision: "It is the purpose of this Act to remedy such unjust results in paternity cases." [9 Uniform Laws Annotated, 1955 Cumulative Pocket Part, p. 17.]

There is no federal statute governing the weight to be accorded the results of blood grouping tests which exclude paternity, and there is a dearth of federal deci-

sions on the subject [But see, *United States v. Shaughnessy*, 220 F. 2d 537 (C. A. 2, 1955), and *Lue Chow Kon v. Brownell*, 220 F. 2d 187 (C. A. 2, 1955), where the court held that these tests might be conclusive under New York law]. In the absence of such a statute, "it is for the federal courts to fashion the governing rule of law according to their own standards" [See, *Clearfield Trust Co. v. United States*, 318 U. S. 363 (1943), at page 367]. In view of the most advanced judicial thought on the subject, as discussed above, appellant submits that this Court should adopt as a standard that blood grouping tests excluding paternity should operate conclusively. This is particularly true where as in the case at bar exclusion arises from the A-B-O system of testing. The latter system was the earliest to be discovered, and is the one used in classifying blood for transfusions. [See Note, 34 Cornell L. Q. 72; Note 26 Calif. L. Rev. 456, footnote 3].

C. The District Court Should Have Granted a New Trial to Avoid a Failure of Justice.

A trial court should, in the exercise of sound discretion, vacate a judgment and order a new trial, where a new trial is necessary to prevent a failure of justice [*Commercial Credit Corp. v. Pepper*, 187 F. 2d 71, 75-76 (C. A. 5, 1951); *Virginia Ry. Co. v. Armentrout*, 166 F. 2d 400, 408 (C. C. A. 4, 1948); *Murphy v. United States District Court, Etc.*, 145 F. 2d 1018 (C. C. A. 9, 1945).] As this Court had occasion to point out in the *Murphy* case, *supra* (p. 1020):

" . . . The granting of a new trial is discretionary with the court and subject to no fixed rule except *a consideration of what is just.* . . ." [Emphasis added.]

In the court below justice was thwarted by the refusal of the District Court to grant a new trial. Blood tests made of appellee and his alleged parents disclosed that it was not possible for appellee to be the child of his alleged father; and that consequently it was not possible for appellee to have acquired citizenship of the United States, as the District Court found.

IV.

The District Court Erroneously Prevented Appellant From Presenting or Offering Any Evidence to Show That Appellee's Blood Was Incompatible With That of His Alleged Parents.

The action of the court below in summarily denying appellant's motion for a supplemental order to require appellee to furnish a second blood sample and ordering judgment for appellee [R. 146-148] deprived appellant of an opportunity to present or offer any evidence to show that appellee's blood is incompatible with that of his alleged parents.

It was the understanding of both counsel and the District Court that *the hearing of June 1, 1956 was to constitute only a partial trial* [R. 61-63, 139, 143, 145]. The cause had originally been calendared "for setting for trial" on July 11, 1955 [R. 8]. However, on May 16, 1955, upon representation of counsel for appellee that "plaintiff's mother is contemplating a trip to Hong Kong" [R. 61], the court below set the matter for trial during the week of May 31, 1956 in order to obtain the testimony of appellee's alleged mother before her departure [R. 61-63]. The District Court did not consider the trial as having been completed on June 1, 1956. Certainly, the usual procedure for the conduct of a complete trial

was not followed, since appellant did not at any time either open or rest his case. At the conclusion of the hearing the court remarked [R. 145]:

“The matter will stand submitted. No, it is not submitted yet. After the receipt of the blood and the report of the doctor, we will have to have the doctor here to testify what it means. . . .

“The matter will be continued until you receive the blood tests and receive the reports. Then I would like the matter to be set down for a hearing. . . .”
[Emphasis added.]

Since it was clearly understood that the hearing of June 1, 1956 would constitute only a partial trial, appellant made no effort to offer the *evidence then available* to show that appellee's blood was incompatible with that of his alleged parents. In addition to the blood tests made of appellee's alleged parents on June 9, 1955 pursuant to court order [R. 22, 45-47], the latter had voluntarily submitted to blood tests conducted by West Coast Medical Laboratories on September 24, 1952 [See reports dated September 24, 1952 relating to Quan Lun Hong and Gee Bo Yoke contained in Ex. “A”]. If the hearing of June 1, 1955 had not been only a partial trial to obtain the testimony of appellee's alleged parents, appellant would have offered at that time evidence of the results of the tests made on September 24, 1952.⁸

⁸West Coast Medical Laboratories has in its files a laboratory record of these tests in the handwriting of the laboratory technician who conducted them. Albert L. Blifeld, the same laboratory technician who tested the blood of appellee's alleged parents on June 9, 1955, and a sample of appellee's blood on August 15, 1955 [R. 2, 45-47] made the test of appellee's alleged parents on September 4, 1952. He was on June 1, 1955, and still is available to testify.

In addition to the test made of a sample of appellee's blood on August 15, 1955 [R. 46], appellee voluntarily submitted to a blood test conducted by Dr. Eric Vio on October 21, 1952 [See reports of Dr. Vio dated October 21, 1952 contained in Ex. "A"]. If the hearing of June 1, 1955 had not been only a partial trial, appellant would have offered in evidence the reports of Dr. Vio contained in Exhibit "A," and if these reports were rejected, moved the court for a reasonable continuance in order that the deposition of Dr. Vio might have been obtained.⁹ The court below had previously ruled on March 1, 1955 in the case of *Ong Hong Way v. Dulles*, Civil No. 13,379 that such reports were not admissible, and for this reason appellant had moved to have a sample of appellee's blood shipped to the United States for testing.

Exhibit "A" was offered in evidence for the restricted purpose of showing the action taken before the American Consul [R. 95]. However, it can be strongly urged that the reports of Dr. Vio contained in this exhibit are admissible for the purpose of showing the results of the blood test made of appellee. Had this test been conducted by a physician in the employ of the United States government, there would be no question of their admissibility as a duly authenticated government record [28 U. S. Code, Section 1733; *United States v. Ware*, 110 F. 2d 739 (C. C. A. 5, 1940); *Burak v. United States*, 101 F. 2d 137 (C. C. A. 9, 1939); Wigmore on Evidence, 3rd Ed., Vol. V, §1630, *et seq.*]. While Dr. Vio was not in the employ of the United States as such, as a physician in

⁹It is submitted that a denial of such a motion would have been an abuse of discretion in view of the fact that the early hearing of June 1, 1955, had been chosen for the convenience of appellee's alleged mother.

Hong Kong, he was obligated to perform his duties properly, and there is a presumption that he did so. [*Pasadena Research Laboratories v. United States*, 169 F. 2d 375, 382 (C. A. 9, 1948), cert. den. 335 U. S. 853]. This obligation combined with the principle of "necessity" constitute the two essentials of the so-called "public document" exception to the rule against hearsay [See Wigmore, *supra*, §§1631-1632]. Moreover, the blood test was conducted by Dr. Vio pursuant to a request by the American Consulate General [See, letter dated October 20, 1952 contained in Ex. "A," on which one of Dr. Vio's reports was made], and in conducting it he was acting in an official capacity for the United States government. Thus, Dr. Vio, in testing appellee's blood, may be considered as a *de facto* public official, and as such his reports of the result of his test, duly authenticated, should be admissible [See Wigmore, *supra*, §1633].

However, appellant was not afforded an opportunity to present evidence of the results of the blood tests made of appellee and his alleged parents during 1952, or of those made during 1955 [R. 146-148]. Despite the fact that the District Court had stated at the conclusion of the hearing of June 1, 1955 that the matter was not submitted, and had indicated that a further hearing would take place [R. 145]; on August 16, 1955 the trial court peremptorily denied appellant's motion for a supplemental order to require appellee to furnish a blood sample, ordered judgment in favor of appellee, *and even refused to permit appellant to make an offer of proof* [R. 147-148].

Appellant believes the District Court erred in denying its motion for a supplemental order; but even if this was not erroneous, the action of the court below in ordering judgment for appellee without affording appellant an op-

portunity to present any evidence to show the incompatibility of appellee's blood with that of his alleged parents requires reversal of its judgment. The erroneous exclusion of evidence resulting in prejudice to a party constitutes reversible error [*Southern Pac. Co. v. Humphrey*, 97 F. 2d 29 (C. C. A. 9, 1938), cert. den. 305 U. S. 656; *New York Alaska Gold Dredging Co. v. Walbridge*, 76 F. 2d 655 (C. C. A. 9, 1935); *Bates v. Oregon-American Lumber Co.*, 295 Fed. 1 (C. C. A. 9, 1924)]. *A fortiori*, where a court refuses to allow completion of a trial, and thereby prevents a party from presenting or offering any evidence on a material issue, its judgment should be reversed.

V.

The District Court Erred in Denying Appellant's Motion for a Supplemental Order to Require Appellee to Furnish a Blood Sample.

In its Memorandum Opinion [R. 31-35] the court below gave as reasons for denying appellant's motion for a supplemental order to require appellee to furnish a blood sample the fact that appellee had been required to pay for the original blood sample [R. 33]; the fact that the government had failed to comply with the original order requiring appellee to furnish a blood sample, in that sample was drawn by Dr. Vio instead of Dr. L. T. Ride, as the order provided [R. 33]; and the fact that the matter had been pending in court since December, 1952 [R. 34].

The original order of the District Court [R. 16-19] did not provide for payment; consequently, the fact that appellee was required to pay, even though erroneous, was not in violation of that order. Moreover, upon learning

On July 18, 1955, that appellee had been required to defray the expenses in connection with his blood sample [R. 23-27], appellant proceeded with dispatch to arrange for his reimbursement [R. 29-30].

Counsel for appellant has been informed that at the time the original blood sample was drawn, Dr. Ride, named in the court's order to draw a sample of appellee's blood, had left Hong Kong, and was not expected to return for several months. It was therefore impossible to comply with the order of the District Court in this respect. Dr. Vio, who was substituted, although referred to by the court below as "a doctor unknown to this court," had previously made a blood test of appellee himself [See Ex. "A"]. There would seem to be no sound basis for attributing the hemolysis of the first sample to the negligence of Dr. Vio [R. 33].

Appellant can only speculate as to the reasons the case had been pending since December, 1952. However, it was probably due to the congestion of the court's calendar resulting from the large number of cases of a similar nature which were filed just prior to December 24, 1952. See *Ly Shew v. Acheson*, 110 F. Supp. 50, 54-55 (N. D. Calif., 1953), reversed on other grounds, *sub. nom. Ly Shew v. Dulles*, 219 F. 2d 413]; to the fact that the passport file relating to appellee [Ex. "A"] was not received in the office of the United States Attorney for the Southern District of California until on or about March 19, 1954 [R. 43]; and to the fact that appellee still resided in Hong Kong, B. C. C. [R. 43]. Granting appellant's motion would have occasioned little delay. The original blood sample was returned to the United States within a

month after the court's order was filed¹⁰; and a second sample could undoubtedly have been obtained in at least the same period of time. Considering the magnitude of the right which the judgment of the District Court vested in appellee, an additional delay of one month would seem relatively unimportant.

While some courts hold that a motion under Rule 35 for a physical examination is discretionary with the trial court [*Bucher v. Krause*, 200 F. 2d 576 (C. A. 7, 1952); *Teche Lines v. Boyette*, 111 F. 2d 579 (C. C. A. 5, 1940)]; discretion relates to judicial, rather than arbitrary action [*Glove Indemnity Co. v. Stringer*, 190 F. 2d 1017, 1018 (C. A. 5, 1951)]; and action becomes arbitrary when it is exercised for an erroneous reason [*Beck v. Wings Field, Inc.*, 122 F. 2d 114, 116 (C. C. A. 3, 1941); *National Ben. Life Ins. Co. v. Shaw-Walker Co.*, 111 F. 2d 497, 507 (C. A. Dist. Col., 1940), cert. den. 311 U. S. 673]. Moreover, this Court has held that although a measure of discretion with respect to a matter is vested in the trial court; where the issues do not rest upon conflicting testimony and an appellate court has substantially the same information as was available to the trial judge, it will not "evade responsibility by resorting to the rule of discretion" [*Walton N. Moore Dry Goods Co. v. Lieurance*, 38 F. 2d 186, 193 (C. C. A. 9, 1930)].

Therefore, even though this court should hold that action upon appellant's motion for a supplemental order was discretionary; appellant submits that its denial, which possibly enabled appellee to judicially establish a fraudulent claim to citizenship was, under the circumstances, an abuse of discretion.

¹⁰The order was filed on May 17, 1955 [R. 19] and the sample was received by West Coast Medical Laboratories on June 14, 1955 [R. 21].

Conclusion.

Wherefore, for the reasons set forth above, it is respectfully submitted that the judgment of the District Court should be reversed and the cause remanded, with directions to dismiss appellee's action for lack of jurisdiction, or, in the alternative, for further proceedings.

Respectfully submitted,

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No. 15006

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

JOHN FOSTER DULLES, as Secretary of State,

Appellant,

vs.

QUAN YOKE FONG,

Appellee.

BRIEF FOR APPELLEE.

KATHLEEN PARKER,

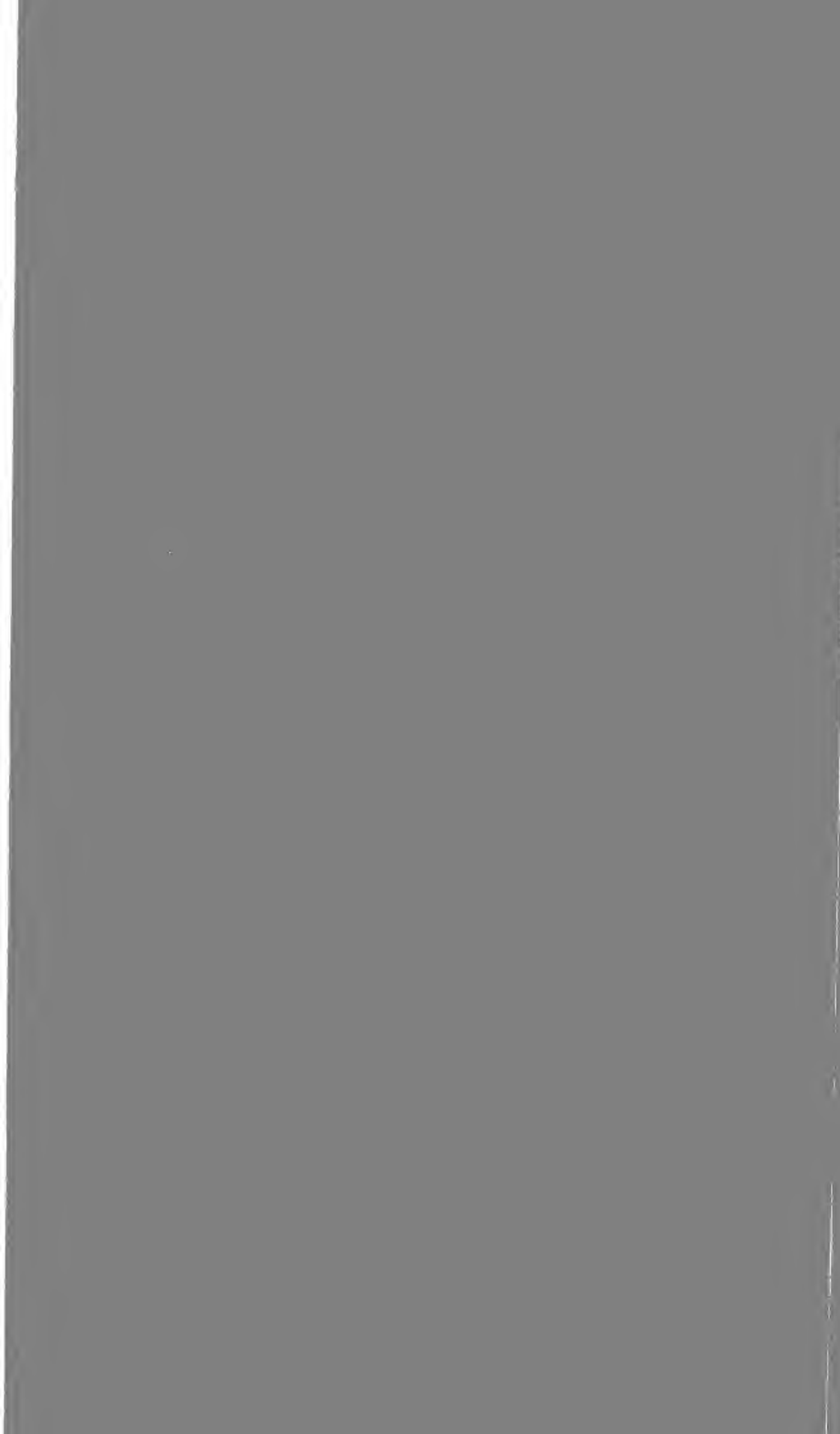
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No. 15006

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

JOHN FOSTER DULLES, as Secretary of State,

Appellant,

vs.

QUAN YOKE FONG,

Appellee.

BRIEF FOR APPELLEE.

Jurisdiction.

This is an appeal from a judgment in favor of plaintiff in an action wherein plaintiff sought to establish his status as a national of the United States. The action was brought pursuant to the provisions of Section 503 of the Nationality Act of 1940 (8 U. S. C. 903) which provides, in part, as follows:

“If any person who claims a right or privilege as a national of the United States is denied such right or privilege by any Department or agency, or executive official thereof, upon the ground that he is not a national of the United States, such person, regardless of whether he is within the United States or abroad, may institute an action against the head of such Department or agency in the District Court of the United States for the District of Columbia or

in the district court of the United States for the district in which such person claims a permanent residence for a judgment declaring him to be a national of the United States. . . .” (54 Stat. 1171-1172; 8 U. S. C. 903.)

In his Petition to Establish Nationality of the United States Pursuant to Section 903, Title 8, U S. C. A. [T. R. 3] appellee alleged, in paragraph I thereof, that he was born in China on February 13, 1930; in paragraph II thereof that he is the legitimate son of Quan Lun Hong; that said Quan Lun Hong was a citizen of the United States at the time of plaintiff's birth, and has lived and resided in the United States since May, 1915; that plaintiff's father, Quan Lun Hong, resides in Los Angeles, California; that plaintiff claims residence in Los Angeles, California, the home of his father; that he is a citizen of the United States [T. R. 3-4]; in paragraphs III and IV thereof that he claims the right and privilege as a citizen of the United states “to enter, stay and remain and reside permanently in the United States as a citizen thereof, but that the said defendant has denied and continues to deny such rights and privileges to the plaintiff upon the ground that he is not a national of the United States.” [T. R. 5.]

In his answer [T. R. 6] defendant denied, on information and belief, the allegations contained in paragraph I of the complaint; denied that Quan Lun Hong was at any time a citizen of the United States, or that he was admitted to the United States at any time as a citizen by

the United States Immigration and Naturalization Service, as alleged in paragraph II of the complaint and denied on information and belief all other allegations contained in said paragraph II; denied each and every allegation contained in paragraphs III, IV and V of the complaint and denied that plaintiff is, or ever has been, a citizen of the United States, or entitled to any rights or privileges as such. [T. R. 6-7.]

The complaint herein was filed on December 23, 1952, before the repeal of Section 503 of the Nationality Act of 1940, by Section 403(a)(42) of the Immigration and Nationality Act of 1952, 66 Stat. 280, effective December 24, 1952.

Since the judgment of the District Court [T. R. 38-39] was a final decision, this Court has jurisdiction of an appeal from that decision under the provisions of 28 U. S. C. 1291 and 1294(1).

Statutes Involved.

Section 1993 of the Revised Statutes of the United States, the pertinent part of which, at the date of plaintiff's birth and prior to its amendment by the Act of May 24, 1934, read as follows:

“All children heretofore born or hereafter born out of the limits and jurisdiction of the United States, whose fathers were or may be at the time of their birth citizens thereof, are declared to be citizens of the United States; but the rights of citizenship shall not descend to children whose fathers never resided in the United States.”

Section 503 of the Nationality Act of 1940, 54 Stat. 1171, 8 U. S. C. A., Section 903, which provides in part, and insofar as is pertinent to this action, as follows:

“If any person who claims a right or privilege as a national of the United States is denied such right or privilege by any Department or agency, or executive official thereof, upon the ground that he is not a national of the United States, such person, regardless of whether he is within the United States or abroad, may institute an action against the head of such Department or agency in the District Court of the United States for the District of Columbia or in the district court of the United States for the district in which such person claims a permanent residence for a judgment declaring him to be a national of the United States”

Statement of the Case.

Appellant's statement of the case is substantially correct. However, there are certain additional facts which appellee believes should be called to the attention of the Court.

It is true, as stated by appellant, that on March 21, 1955, the case had been continued to July 11, 1955, “for setting for trial.” [T. R. 8.] On May 6, 1955, appellant filed a motion to dismiss pursuant to Rule 12(b)(1) and (6) and Rule 12(h), Federal Rules of Civil Procedure, on the grounds that the court lacked jurisdiction over the subject matter of the action and that the complaint failed to state a claim upon which relief could be granted [T. R. 13], and at the same time filed a motion

to require appellee and his parents to submit to blood tests under Rule 35, Federal Rules of Civil Procedure. [T. R. 9.] These motions were heard on May 16, 1955, appellee appearing in opposition to both motions, and the Court denied the motion to dismiss and granted the motion to require plaintiff and his parents to submit to blood tests. [T. R. 16.] At the time of the hearing on the motions, appellee's counsel inquired of the Court as to whether it could indicate when the matter might be tried, stating that the plaintiff's mother desired to visit plaintiff in Hong Kong and would schedule her trip according to the trial date. The Court said that it would prefer to take the testimony of the parents before plaintiff's mother went to Hong Kong, and stated:

“The Court: Can we do this? If the mother and father are here, can't we go ahead and take their testimony and then hold in abeyance the report on the blood sample? . . .

Mr. Dooley: Yes, your Honor. The defendant has no objection to that procedure. . . .” [T. R. 62.]

The matter was then set for trial on May 31, 1955, and when the case was called on that date the following colloquy occurred between the court and counsel:

“Miss Parker: Ready for the plaintiff.

Mr. Dooley: The defendant is ready, your Honor.

The Court: When will you be ready to go to trial?

Miss Parker: Any time.

Mr. Dooley: Any time, your Honor. This is a case where decision will be postponed until the blood test is determined.

The Court: Tomorrow?

Miss Parker: Satisfactory.

Mr. Dooley: Satisfactory." [T. R. 64.]

At the conclusion of the taking of the testimony of plaintiff's witnesses and the cross-examination by defendant, the matter was continued for 60 days pending receipt of the blood tests taken pursuant to the order of Court of May 16, 1955, and upon receipt thereof the matter was to be set for further hearing. [T. R. 145.]

On July 1, 1955, appellant filed a motion for a supplemental order to require appellee to furnish a blood sample upon the grounds that it was impossible to test the blood sample received by the West Coast Medical Laboratories from Hong Kong on June 14, 1955, and identified by markings as containing the blood of plaintiff, such blood sample having hemolyzed. [T. R. 21.]

Appellee appeared in opposition to the motion, which was heard on July 18, 1955, and filed the affidavit of plaintiff's father, Quan Lun Hong, to which were attached as exhibits letters from the plaintiff together with a statement showing that plaintiff had been billed and paid Dr. Eric Vio the sum of \$256.00 Hong Kong currency and \$4.00 American currency in connection with the taking of the blood sample. [T. R. 23-28.] On August 16, 1955, the Court denied appellant's motion for a supplemental order to require appellee to furnish a blood sample and ordered judgment for appellee. [T. R. 147.]

On September 12, 1955, appellant moved for a new trial [T. R. 57], which motion was denied on October 3, 1955. [T. R. 57.]

ARGUMENT.

I.

The Issues.

Appellant does not challenge the sufficiency of the evidence to support the findings of fact and conclusions of law that plaintiff is a citizen and national of the United States. He is attacking the judgment solely upon (1) jurisdictional grounds and (2) alleged error on the part of the District Court in (a) denying appellant's motion for new trial, (b) preventing appellant from presenting or offering evidence that plaintiff's blood was incompatible with that of his parents and (c) denying appellant's motion for a supplemental order to require plaintiff to furnish a blood sample.

Appellee admits that in order to maintain his action under Section 503 of the Nationality Act of 1940, it was incumbent upon him to prove as a jurisdictional requisite that at the time his complaint was filed he had been denied a right or privilege as a national of the United States upon the ground that he was not a national of the United States. It is appellee's contention, however, that the allegations necessary for jurisdiction were alleged in the complaint and were proved at the trial of the action.

II.

The District Court's Finding That the Delay in Processing Plaintiff's Passport Application Was Unreasonable and the Failure to Act on Such Passport Application Within a Reasonable Time was a Denial of Plaintiff's Rights and Privileges as a National of the United States Is Sustained by the Evidence and Meets the Jurisdictional Requirement for an Action Under Section 503 of Denial on the Grounds Appellee Is Not a United States National.

In his complaint plaintiff alleged that he was born on February 13, 1930, in China; that he is the legitimate son of a citizen of the United States; that he claims residence in Los Angeles, California, the home of his father; that he claims to be a citizen of the United States and entitled to the rights and privileges of a citizen of the United States; that he had theretofore filed an application for an American passport or other travel document as a citizen of the United States with the American Consulate General at Hong Kong for the purpose of traveling to the United States to join his father; that the American Consulate General at Hong Kong has refused to issue to plaintiff the passport applied for, thereby denying plaintiff's American citizenship and his rights and privileges as a citizen of the United States; that plaintiff has at all times claimed and now claims the right and privilege as a national of the United States of America to enter, stay and remain and reside permanently in the United States as a citizen thereof, but that the defendant has denied and continues to deny such rights and privileges to the plaintiff upon the ground that he is not a national of the United States. Such allegations are suf-

ficient to give the court jurisdiction to hear and determine the cause. (*Jew May Lune v. Dulles*, 226 F. 2d 796.)

In *Jew May Lune v. Dulles*, *supra*, the court stated, at page 798:

“There were sufficient ‘facts’ set up in the petition to give the court jurisdiction to hear and determine the cause. It was alleged that her rights were denied upon the ground that she was not a national. Under federal forms of pleading, this is sufficient, and, besides, there were allegations which, if proved, would show she was a national and that there was a refusal to issue a passport. The defendant denied these allegations. This was sufficient basis for jurisdiction. The court was then required to try the matter.

“* * *

“ . . . where allegations have been made which are necessary for jurisdiction, the action will fail if these are not proved. The reservation in 12(h), Federal Rules of Civil Procedure, is for extraneous circumstances, which demonstrates that the court has no authority to hear and determine. All tribunals in the federal system must at all stages of the proceeding make certain of the possession of power to act. But, where there are allegations of key jurisdictional facts which are controverted, there always exists power to try the issues thus made. Jurisdiction existed to try the questions here.”

Appellant asserts, however, that appellee failed to prove the facts alleged in the complaint in that he has not established that there was either an express or an implied denial of plaintiff's passport application prior to the date the action herein was filed.

The action of a consular officer in denying an application filed by an alleged foreign-born son of an American citizen for a passport to the United States is a denial of a claimed right or privilege as a national of the United States upon the ground that he was not a national of the United States, such as would give the federal court jurisdiction to determine nationality status. (*Fong Nai Sun v. Dulles*, 219 F. 2d 269; *Chin Chuck Ming v. Dulles*, 225 F. 2d 849.)

Plaintiff's passport application was executed and filed with the United States Consulate General at Hong Kong on May 13, 1952. The present action was filed December 23, 1952, at which time there had been no formal denial of plaintiff's application for a passport. The court found, however, that the delay in acting upon the application was unreasonable and the failure to act on the application within a reasonable time was a denial of plaintiff's rights and privileges as a national and citizen of the United States.

Webster's New International Dictionary, Second Edition, defines the word "deny" as follows:

"1. To declare not to be true; gainsay, contradict; —opposed to affirm, allow or admit. 2. To refuse (one who asks). 3. *To refuse to grant; to withhold; to refuse to gratify or yield to;* 4. . . . *to refuse to acknowledge. . . .*" (Italics added.)

Clearly by withholding the issuance to appellee of a travel document which would enable him to proceed to the United States, and to which any American citizen is entitled as a matter of right, appellant has in effect denied him such right upon the ground that he is not a citizen of the United States. Upon no other ground could the consul withhold or decline to issue the travel document.

An unreasonable delay in acting upon a passport application is equivalent to a denial thereof. (*Chin Chuck Ming v. Dulles, supra.*) Appellee maintains that under the circumstances in the instant case, a delay of over seven months in acting upon his passport application was unreasonable and an implied denial thereof.

As was aptly stated by the court in *Nuspel v. Clark*, 83 Fed. Supp. 963 at 965:

“Counsel for defendant asserts that this ‘holding in abeyance’ does not constitute a denial of such rights and privileges. It seems, however, the failure to grant the visa for plaintiff’s wife within a reasonable time constitutes a denial of such application equally as much as justice delayed is justice denied.”

Over the objection of appellee, appellant introduced into evidence “Statement Regarding the Processing of Passport Applications at the American Consulate General in Hong Kong.” [Deft. Ex. “B.”] Appellee maintains that his objection should have been sustained since the evidence is clearly incompetent, irrelevant and immaterial. However, assuming but not conceding that the evidence was admissible, it supports appellee’s contention that the delay in processing his case was unreasonable. From that document it would appear that defendant claims that the reasons for the delay in processing of passport applications were the transfer to the Hong Kong Consulate of a heavy load of cases from the Canton Consulate upon the closing of the latter Consulate in 1949, and the lack of facilities and personnel to process such cases; that as of September 1, 1952, more stringent examination and investigation procedures were authorized, including the blood-typing of claimants and their alleged parents.

However, from this same document it is noted that in November, 1950, the Department assigned a Foreign Service inspector, two departmental employees and fourteen members of the Foreign Service to Hong Kong and authorized the employment of sufficient local alien personnel to serve as interpreters and give clerical assistance and work on the backlog of pending citizenship claims. By July 1, 1951, this backlog had been reduced from 3600 to 2100 cases, some 600 of which were not "live." From June 1, 1951, to July 1, 1952, over 2600 cases were processed and by July 1, 1952, new claims were reduced to 25 per month. [P. 3.]

Since by the middle of 1952, there were only 25 new applications being filed each month, with additional facilities and personnel it appears obvious that passport applications could be acted upon within a seven months' period. As a matter of fact, appellee's application was processed in six months. Appellee's passport application was filed May 13, 1952. Blood tests were taken in September and October, 1952, and appellee was interviewed on October 28, 1952. On November 13, 1952, precisely six months after the filing of the application, an American Vice Consul recommended that it be denied. Appellant has furnished no excuse for the delay of practically another two months before there was a "formal" disapproval of appellee's passport application, nor does the document upon which appellant relies suggest any reason why such formal denial could not have been made prior to the date the instant action was filed.

As was stated in *Chin Chuck Ming v. Dulles, supra*, at page 852:

"We construe the words 'right or privilege as a national of the United States' of the first two lines

of Section 503 to cover the right to a prompt disposition of a claimed citizens' application . . .

"* * *

"Dulles contends that we should take judicial notice of the fact that a large number of similar applications were pending on September 6, 1951 when appellants' was filed and that Congress has not appropriated sufficient funds to give him the qualified personnel at Hong Kong to enable the State Department to dispose of them in the intervening months. He makes no claim that he applied to Congress for such funds. Assuming we can take such judicial notice, we think the right to a prompt consideration of appellants' application cannot be denied them for such a reason."

See also:

Lee Bang Hong v. Acheson (D. C. Hawaii), 110 Fed. Supp. 48, 50;

Lee Hong v. Acheson (D. C., N. D. Cal.), 110 Fed. Supp. 60;

Look Yun Lin v. Acheson (D. C., N. D. Cal.), 95 Fed. Supp. 583, 584.

Moreover, on December 11, 1952, approximately one month after the Vice Consul had recommended that the passport application be denied, plaintiff's father cabled the American Consulate General at Hong Kong asking for a decision prior to December 23, 1952, in order to protect plaintiff's citizenship rights [Deft. Ex. "A."] On December 17, 1952, plaintiff's father wired the Passport Division of the Department of State in Washington, D. C., stating that he had been advised by the American Consul at Hong Kong that the passport application of his son, Quan Yoke Fong, had been transmitted with

appropriate recommendation to that office for final decision, and requesting that in order to protect his son's American citizenship rights, the department wire him collect prior to December 23, 1952, of their decision; that if not advised of a favorable decision prior to December 23, he would assume the application was denied. [Pltf. Ex. 8.] No reply to this telegram was received by plaintiff's father prior to December 23, 1952 [T. R. 138], yet a formal denial of the application was made two weeks thereafter.

In *Yung Jin Teung v. Dulles*, 229 F. 2d 244 at 246, the court stated:

"First of all we note that the State Department may have effectively determined the plaintiff's claim of citizenship adversely even though it took no final official action which explicitly constituted such a determination. Thus a passport may be denied on the statutory ground by a refusal to determine a claim of citizenship for an unreasonable length of time, *Chin Chuck Ming v. Dulles*, 9 Cir., 1955, 225 F. 2d 849, or by insisting upon the production of evidence of citizenship when it is clear that the applicant cannot produce it. *Wong Ark Kit v. Dulles*, D. C. D. Mass. 1955, 127 F. Supp. 871; *Ow Yeong Yung v. Dulles*, D. C. N. D. Cal 1953, 116 F. Supp. 766. On the other hand if a delay in acting on an application is entirely the fault of the applicant, then such delay would not constitute a denial. Thus where the consul informs the applicant that no decision has been reached and requests certain additional evidence, there may yet be no effective denial if the applicant has neither produced additional evidence nor informed the consul that he will not do so. *Ling Share Yee v. Acheson*, 3 Cir., 1954, 214 F. 2d 4, certiorari denied 1954, 348 U. S. 873, 75 S. Ct. 109, 99 L. Ed.

687. We must therefore determine whether the papers here show that there had been no explicit adverse determination of the plaintiffs' claim and, further, that there had been no implicit adverse determination within the principle of these decisions."

The court further stated, at page 247:

" . . . it should be noted that the statute barring suits after December 24, 1952 was passed in June of 1952, thus putting the government on notice that unless it acted in six months applicants might lose their rights to bring action under the statute."

It is submitted that there was ample evidence upon which the District Court could find, as it did, that the delay of over seven months in acting upon plaintiff's passport application was unreasonable and that therefore there was an implied denial thereof.

III.

The District Court Properly Denied Appellant's Motion for New Trial.

Appellant's motion for new trial was upon the grounds of "newly-obtained" and "newly-discovered" evidence which, he alleged, defendant could not with reasonable diligence have obtained and produced at the trial. The evidence which defendant desired to introduce, according to the affidavits filed in support of his motion [T. R. 41-56], consists of the results of the blood tests taken of plaintiff's parents on June 9, 1955, pursuant to the order of the District Court of May 10, 1955, and the result of a blood test made of specimens of blood contained in vials received by the West Coast Medical Laboratories from Hong Kong on August 15, 1955, allegedly bearing the name of Quan Yoke Fong, and which, appellant asserts,

would prove that "it is not possible for appellee to be the child of his alleged father, and that consequently, it was not possible for appellee to have acquired citizenship of the United States at birth pursuant to Section 1993, Revised Statutes of the United States." (Op. Br. p. 15.)

Defendant contended he could not with reasonable diligence have obtained and produced such evidence at the trial because (1) plaintiff has at all times since his petition was filed resided in Hong Kong, B. C. C.; (2) defendant's counsel did not receive the passport file relating to plaintiff until March 19, 1954, although the action was filed December 23, 1952; (3) on March 19, 1954, defendant's counsel did not know whether defendant would permit plaintiff to come to the United States for the purpose of trial and he did not believe the matter would be tried in the absence of plaintiff and (4) defendant's counsel believed until March 1, 1955, that certain evidence in his possession, to wit, "reports of blood tests made of plaintiff and his alleged parents" would be admissible in evidence. [T. R. 43-44.]

This action was filed December 23, 1952. It was not tried until June 1, 1955. During this period of approximately two and a half years defendant knew that plaintiff was residing in Hong Kong, B. C. C., and that he would not permit plaintiff to come to the United States for the trial of the action. During this same period of time defendant or his attorneys were in possession of the passport file. Defendant is therefore in no position to complain of the fact that he failed to advise his attorneys as to his intentions and neglected to furnish his counsel with the passport file until sixteen months after the filing of the petition herein. Defendant could very easily have obtained the evidence which he now seeks to introduce

on a new trial by granting plaintiff's application for a Certificate of Identity and permitting him to proceed to the United States for the purpose of trial.

Defendant's counsel admitted in his affidavit in support of his motion for new trial that defendant had in his possession long prior to the time of trial evidence consisting of the results of blood tests taken of plaintiff and his parents. He alleges, however, that he thought such evidence was admissible until the decision of Court on March 1, 1955, in *Ong Hong Way v. Dulles*, Civil No. 13,379, holding such reports of blood tests not admissible. Some two months later, defendant moved the District Court for an order requiring plaintiff to furnish a blood sample to be transported to the United States for testing. It was for that reason, defendant's counsel alleged in his affidavit, that he could not with reasonable diligence have discovered and produced at the trial the evidence which he now asserts is newly-discovered and newly-obtained. [T. R. 43-44.]

Obviously this was not newly-discovered and newly-obtained evidence. It is the same evidence which defendant had in his possession long prior to the time of trial but in a form which he now is of the opinion is admissible. That a party learns for the first time prior to or at the time of trial that his evidence is inadmissible in the form in which it is his intention to offer it is clearly not grounds for a new trial after he has obtained the same evidence in what he considers to be a "form which is admissible." Following defendant's reasoning, if the evidence which he now claims is in a form which is admissible should, at or prior to a new trial, be held inadmissible, he could use that as grounds for another new trial if he obtained the same evidence in still another form.

As the District Court stated in its memorandum:

“This matter has been pending in the court since December, 1952. Nearly three years have elapsed since plaintiff filed his action. If plaintiff has any legitimate claim, it should be passed upon. It should, in fact, have been passed upon before now.” [T. R. 34.]

Moreover, the evidence upon which defendant is seeking a new trial would be inadmissible. The blood test of plaintiff's parents taken on June 9, 1955, was pursuant to the order of the District Court of May 10, 1955. This order was void since the court was without jurisdiction to order plaintiff's parents, who were not parties to the action, to submit to a blood test under Rule 35(a) of the Federal Rules of Civil Procedure. (*Fong Sik Leung v. Dulles*, 226 F. 2d 74.) Plaintiff's parents did not appear voluntarily but in compliance with an invalid order. The evidence having been illegally obtained was, therefore, inadmissible.

Concededly no blood test could be made of the blood sample allegedly drawn from plaintiff pursuant to the order of the District Court of May 10, 1955, the same having hemolyzed. Thereafter, on July 1, 1955, defendant moved the court for a supplemental order to require plaintiff to furnish a blood sample. On the hearing on defendant's motion held on July 18, 1955, the matter stood submitted. On August 16, 1955, the motion was denied. Nevertheless, without waiting for a hearing on his motion, defendant on August 12, 1955, caused the Vice Consul at Hong Kong to obtain a blood sample from plaintiff. According to the affidavit of the Vice Consul such sample was obtained “for the second time as directed by the Department of State in an instruction

dated July 6, 1955." [T. R. 56.] Attention of the court is also called to the fact that the Vice Consul alleges in his affidavit that he personally witnessed the "drawing of *two samples* of blood from Quan Yoke Fong" by Dr. Eric Vio, and such *samples* were "placed by said doctor in *vials*" in the presence of the affiant. [T. R. 56.] The affidavit of Albert L. Blifeld [T. R. 46] alleges that on August 15, 1955, there was delivered to West Coast Medical Laboratories a sealed container, which by its markings indicated it was sent from Dr. E. Vio; that inside this container were several vials, also sealed, "*two of which* bore the name of Quan Yoke Fong." Dr. Eric Vio alleges in his affidavit [T. R. 52] that on the 12th day of August, 1955, "I drew *a sample* of blood from Quan Yoke Fong" and such sample was "forthwith placed by me in "*a vial*" and "*said vial*" was sealed and "*said vial*" was then delivered to Pan American Airways. In the affidavit of Quan Yoke Fong it is alleged that on August 12, 1955, "Dr. Vio took *a sample* of blood from me and such blood *sample* was forthwith placed by him in '*a vial*' and the '*said vial*' was then sealed." [T. R. 54.] (Italics added.)

It is submitted that such evidence of the results of blood tests would be inadmissible since (1) it was illegally obtained and (2) it could not be introduced by way of affidavits.

In any event, a motion for a new trial is directed to the sound judicial discretion of the trial court.

Holmgren v. United States, 217 U. S. 509, 54 L. Ed. 861, 30 S. Ct. 588;

Sparrow v. Strong, 70 U. S. 97, 3 Wall. 97, 18 L. Ed. 49;

Life & Fire Ins. Co. of New York v. Wilson's Heirs, 33 U. S. 291, 8 Pet. 291, 8 L. Ed. 949;

Elsig v. Gudwangen, 91 F. 2d 434;

Davis v. Yellow Cab Co. of St. Petersburg, 220 F. 2d 790, 791.

See also cases cited in:

39 Am. Jur., New Trial, Sec. 201, p. 199.

Appellee maintains that in the instant case the District Court did not abuse its discretion and the motion was properly denied.

IV.

The District Court Did Not Prevent Appellant From Presenting or Offering Evidence to Show That Appellee's Blood Was Incompatible With That of His Parents.

At the time of the trial on June 1, 1955, it was the understanding of both counsel and the District Court that the testimony of the witnesses would be taken and that the matter would then be continued until the results of the blood tests taken pursuant to the order of the court of May 10, 1955, had been received, at which time a further hearing would be set for the sole purpose of taking evidence relative to such blood tests. [T. R. 62, 145.] Appellant could have offered any evidence which he desired to offer at the trial on June 1, 1955. He offered no other evidence and it was understood by both counsel and the District Court that the trial of the case was completed with the exception of the results of the blood tests, as aforesaid.

Appellant now states that if the hearing of June 1, 1955, had not been only a partial trial, appellant would have offered in evidence the reports of Dr. Vio contained in Exhibit "A," and if these reports were rejected,

moved the court for a reasonable continuance in order that the deposition of Dr. Vio might have been obtained. He admits, however, that on March 1, 1955, the court had ruled that such reports were not admissible, and for that reason he had moved to have a sample of appellee's blood shipped to the United States for testing. Appellant had from March 1, 1955, to the time of trial to obtain the deposition of Dr. Vio, had he so desired. Obviously, appellant had no intention of offering the report of Dr. Vio contained in Exhibit "A" and was relying solely upon the results of the blood tests taken pursuant to the order of the court of May 10, 1955. At no time did appellant indicate he wanted to offer in evidence the results of the blood tests taken in 1952. Appellant's argument to the court on August 16, 1955, at which time he urged the court to permit him to make an offer of proof, was directed solely to the results of the blood tests of the parents taken pursuant to the invalid order of the District Court of May 10, 1955, and to the result of the blood test of the sample allegedly taken from the plaintiff on August 12, 1955, at the direction of the appellant and without court order. [T. R. 146-148.]

As has been heretofore stated, on June 1, 1955, the matter was continued solely for the purpose of allowing appellant to offer into evidence the results of the blood tests obtained pursuant to the order of the District Court of May 10, 1955. On July 18, 1955, the court had taken defendant's motion for the supplemental order under submission, allowing defendant until August 15, 1955, to produce affidavits relative to certain matters in Hong Kong. [T. R. 146.] This not having been done, the court declined to continue the matter further and on August 16, 1955, denied defendant's motion. [T. R. 145.] Moreover, appellant admitted on his motion for

a supplemental order to require plaintiff to furnish a blood sample that he could not offer evidence of the result of the blood test of plaintiff because the blood sample had hemolyzed. This being admitted, there was no reason for the court to continue the case for further trial upon denying the motion for the supplemental order.

V.

The District Court Did Not Err in Denying Appellant's Motion for a Supplemental Order to Require Appellee to Furnish a Blood Sample.

Defendant did not comply with the order of the District Court in the taking of plaintiff's blood test. Rule 35(a) requires the examination to be made by a physician and the order to specify the person or persons before whom the examination is to be made. As stated in *Fong Sik Leung v. Dulles*, 226 F. 2d 74, at page 79: "The right to the names of one or more such physicians is to enable the litigant to protest to the court that the examining persons are incompetent or prejudiced, the latter on various grounds, . . ." The order of the District Court named Dr. L. T. Ride, Vice Chancellor, Hong Kong, B. C. C., as the physician to whom plaintiff should present himself for the taking of the blood test. Contrary to said order defendant directed plaintiff to Dr. Vio, a physician of his own selection, at the same time requiring plaintiff to pay Dr. Vio \$256.00 Hong Kong currency and \$4.00 American currency to the American Consulate General. Upon the arrival of a blood sample in the United States, alleged to be that taken from plaintiff, it was discovered that the blood had hemolyzed and could not be tested. Thereupon defendant filed a notice of motion for a supplemental order to require plaintiff to furnish a blood sample. However, before such motion

ould be heard defendant, without authority of the court, again directed plaintiff to Dr. Vio for the purpose of submitting to another blood test. Counsel for plaintiff was not advised in the matter and was therefore precluded from objecting and from advising plaintiff. Under the circumstances of the taking of the blood test it cannot be said that plaintiff voluntarily submitted thereto. In any event, plaintiff complied with the court's order of May 10, 1955—defendant did not. As pointed out by the District Court in its memorandum, defendant filed his motion to require plaintiff and his parents to furnish blood samples shortly before the time of trial and 29 months after the petition was filed. Nevertheless, the court granted defendant's motion and continued the trial for sixty days to permit defendant to introduce the results of such tests. Defendant did not comply with the court's order but selected a physician of his own choosing and the blood sample allegedly shipped by such physician could not be tested because it had hemolyzed. Clearly under such circumstances the court was justified in denying defendant's motion, the granting of which would have necessitated a further indefinite continuance.

Furthermore, the court was aware of the fact that under the decision in *Fong Sik Leung v. Dulles, supra*, its order of May 10, 1955, directing plaintiff's parents to submit to a blood test was invalid. Obviously there would be no point in ordering plaintiff to submit to a blood test if the results of the blood tests of his parents was inadmissible.

The District Court stated in its memorandum filed August 16, 1955, as follows:

“At the time of trial the mother and father of plaintiff appeared in Court, and each testified plain-

tiff was their son. Had there not been a request by defendant that plaintiff and the parents furnish a blood sample, the Court would have rendered judgment for plaintiff from the bench at the conclusion of the trial, as the testimony of a mother undoubtedly is the best evidence obtainable relative to the paternity and birth of her child. The government filed its motion requesting blood samples just prior to trial.

“Judgment at the time of trial was delayed because of the blood sample request. The matter was submitted to the Court on the evidence presented at the trial. The Court is satisfied with the testimony of the witnesses in this case, which testimony in the Court’s opinion establishes plaintiff’s claim that he is the son of an American citizen. The Court does not feel constrained to continue the matter further.” [T. R. 34.]

Appellee submits that the court was well within its discretion in refusing to continue the matter further for the purpose of allowing appellant to obtain another blood sample from plaintiff.

Conclusion.

Wherefore, for the reasons hereinabove set forth, it is respectfully submitted that the judgment of the District Court should be affirmed.

Respectfully submitted,

KATHLEEN PARKER,

Attorney for Appellee.

No. 15006

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

JOHN FOSTER DULLES, as Secretary of State,

Appellant,

vs.

QUAN YOKE FONG,

Appellee.

APPELLANT'S REPLY BRIEF.

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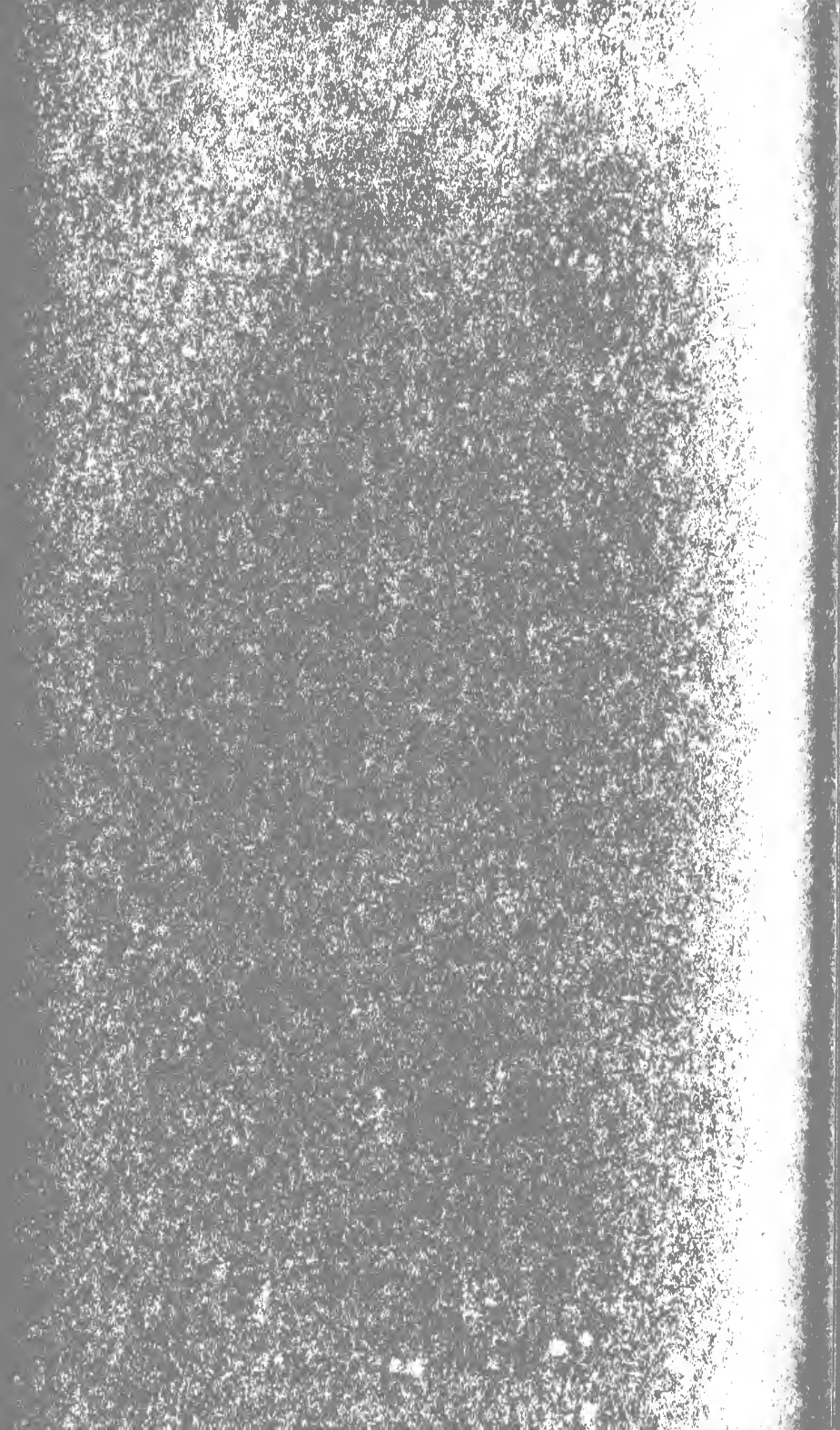
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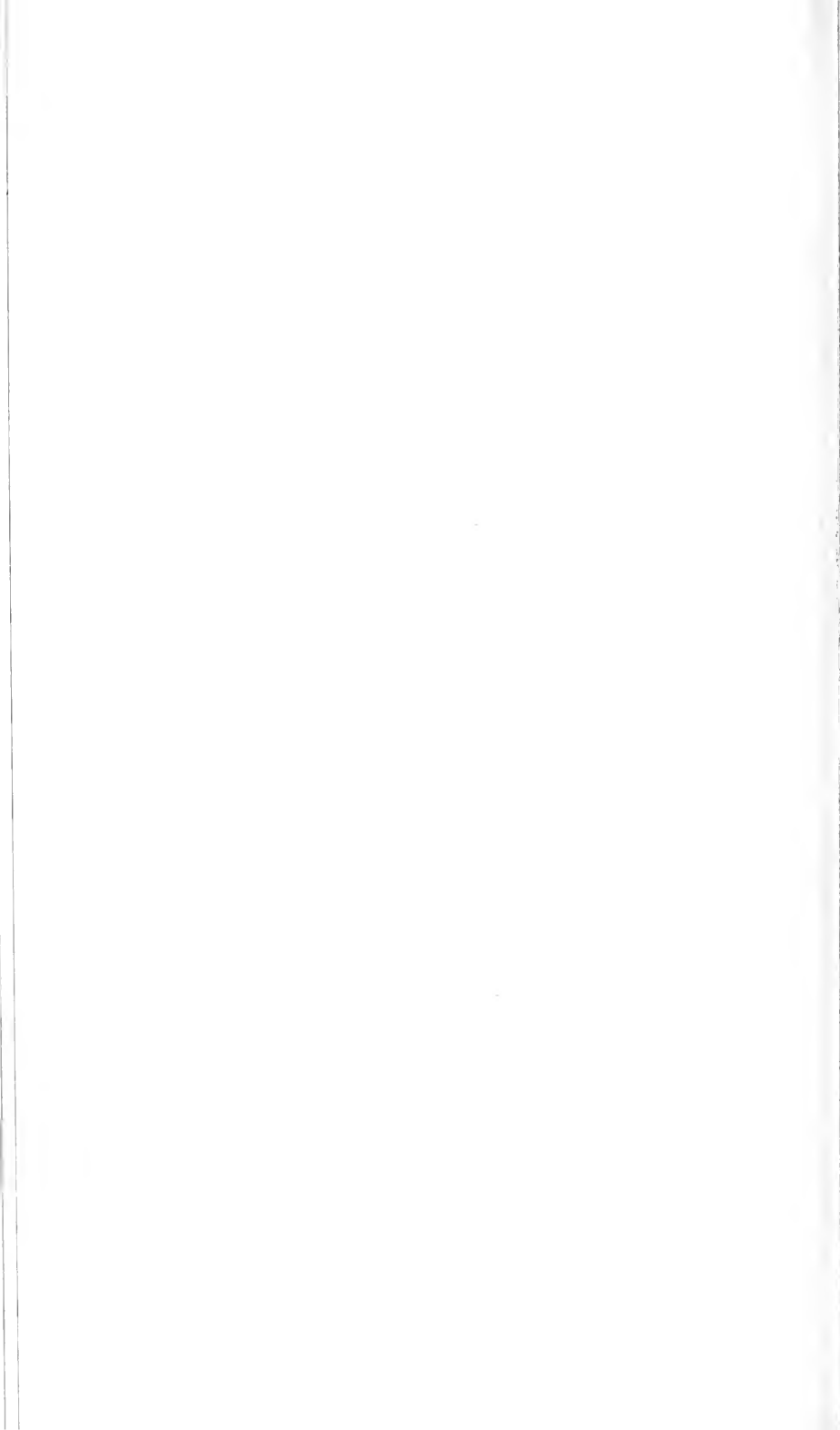
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No. 15006
IN THE
United States Court of Appeals
FOR THE NINTH CIRCUIT

JOHN FOSTER DULLES, as Secretary of State,
Appellant,

vs.

QUAN YOKE FONG,
Appellee.

APPELLANT'S REPLY BRIEF.

I.

There Was No Implied Denial of Appellee's Passport Application.

Appellee urges that appellant's Exhibit B, "Statement Regarding the Processing of Passport Applications at the American Consulate General in Hong Kong" supports appellee's contention that "the delay in processing his case was unreasonable" (Br. 11).¹ In the course of his argument appellee indicates that Exhibit B makes the following statement: "By July 1, 1951, this backlog had been reduced from 3600 to 2100 cases, some 600 of which were not 'live' " (Br. 12). However, Exhibit B actually states as follows: "By July 1, 1951, the backlog of pending cases *antedating September 1, 1950* had been reduced to ap-

¹"Br." indicates references to the Brief for Appellee.

proximately 2100 cases, not all of which were 'live', however, since in some 600 of them there was no means of communicating with the claimants . . .” [Ex. B, p. 3; Emphasis added]. The difference between the two statements is significant. Undoubtedly, a large number of claims were pending as of July 1, 1951 which had been filed between September 1, 1950 and July 1, 1951; since during this period cases were “still coming in at the rate of approximately 150 per month” [Ex. B, p. 3]. The actual statement contained in Exhibit B completely vitiates appellee’s argument.

The statistics set forth in the Affidavit of Thurston Francis Waterman,² who was from April, 1948 to April, 1955, Chief of Section, Foreign Branch, Passport Office, Department of State, clearly demonstrates the inaccuracy of appellee’s position. This affidavit discloses that as of July 1, 1952, 1891 claims were pending (p. 6). One of these claims was that of appellant, since his passport application was filed on May 13, 1952. However, 1179 of the claims pending on July 1, 1952 had been initiated prior to January 1, 1952 (p. 7) and were certainly entitled

²To clarify Exhibit B, which is a part of the record, appellant during oral argument moved this Court to judicially notice the administrative conditions existing at the American Consulate General at Hong Kong, as supplemented by the affidavit of Thurston Francis Waterman, and presented this affidavit as an aid to the Court. This affidavit presents more detailed statistics concerning the “back-log” in citizenship claims pending at the Consulate during the pertinent times involved than does Exhibit B. These supplemental conditions are a proper subject of judicial notice, as illustrated by the following cases:

N. L. R. B. v. E. C. Atkins Co., 331 U. S. 398, 406 (1947), where the Supreme Court took judicial notice of the contents of a circular issued by Headquarters, Army Service Forces. The Court said (p. 406, fn. 2):

“Circular No. 15 was not introduced into evidence in the proceedings before the Board. But it was issued by military

to preference over appellee's application. In addition, those claims instituted between January 1, 1952 and May 12, 1952, which antedated appellee's passport application, and which may be roughly computed at 481,³ should be considered. Thus, as of July 1, 1952, approximately 1660 claims were entitled to a priority over the claim of appellee. Since between July 1, 1952 and December 23, 1952, 577 claims were processed (p. 6); to urge that the failure to complete appellee's claim during this period constituted an unreasonable delay is equivalent to

authorities pursuant to the power vested in the Secretary of War by Executive Order No. 8972 and we may take judicial notice of it"

Stainback v. Mo. Hock Ke Lok Po, 336 U. S. 368, 375 (1948): where the Court judicially noticed a practice in the administrative office of the United States Courts; *Ponce v. Roman Catholic Church*, 210 U. S. 296, 309 (1908), where the Court took judicial notice of the history of Porto Rico and its legal and political institutions up to the time of its annexation to the United States.

Other cases where judicial notice was taken are: *Ex Parte Milligan*, 4 Wall (71 U. S.) 2, 121 (1866): that in Indiana the Federal authority was always unopposed, and that its Courts always open to hear criminal accusations and redress grievances; *Hunter v. Wade*, 169 F. 2d 973, 976 (C. A. 10, 1948), aff'd 336 U. S. 634: that the armed forces of the United States engaged in the prosecution of the war in the European theatre were moving rapidly and that conditions in the field were more or less fluid; *De Witt v. Wilcox*, 161 F. 2d 785, 787 (C. C. A. 9, 1947): the extraordinary difficult and diverse problems confronting General De Witt in his protection of the 1500 miles of Pacific Coast waters and adjacent areas in California, Oregon and Washington during the war.

See also *Shapleigh v. Mier*, 299 U. S. 468, 474-475 (1937), where Justice Cardozo intimates that it is not only proper, but necessary, that an appellate court be furnished extrinsic aids, such as the affidavit presented to this Court, as a prerequisite to its taking judicial notice.

³Between January 1, 1952 and June 30, 1952, 722 claims were initiated (p. 6). Assuming that during each month of this six-month period an equal number of claims was initiated, and assuming for purposes of computation that appellee's passport application was filed on May 1, 1952 instead of the later date of May 13, 1952, 481 of the 722 claims would have been filed before that of appellant.

demanding an unwarranted preference in his favor. (Compare: *Wong Dick Wing v. Dulles*, 140 Fed. Supp. 261 (S. D. N. Y., 1956), where a period of 16 months and 12 days elapsed between the date plaintiff's affidavit-application was filed on August 7, 1951, and the date his action was commenced on December 19, 1952.)

II.

The District Court Erred in Denying Appellant's Motion for a New Trial.

A. Appellant Acted With Reasonable Diligence.

Appellee's contention that appellant did not act with reasonable diligence in securing the evidence supporting his motion for a new trial (Br. 16-18), when considered in conjunction with the large number of actions instituted under §503 of the Nationality Act of 1940 immediately preceding its repeal and the judicial uncertainty which thereafter developed, is untenable. According to *Ly Shew v. Acheson*, 110 Fed. Supp. 50, 54-55 (N. D. Calif., 1953), reversed on other grounds sub. nom. *Ly Shew v. Dulles*, 219 F. 2d 413, a total of 1288 actions by children born abroad allegedly of American citizen parents were instituted. The Courts were also inundated with actions for declaration of nationality instituted by citizens who had allegedly expatriated themselves under §401 of the Nationality Act of 1940, 8 U. S. C. A. §801. In view of the fact that administrative action to compile the passport files relating to most of these plaintiffs was required, it does not appear unusual that the passport file relating to appellee was not received in the office of the United States Attorney for the Southern District of California until about March 19, 1954 [R. 43].⁴ More-

⁴"R" refers to printed Transcript of Record.

over, where an action has been instituted under §503 after denial of a citizenship claim abroad, administrative action must *thereafter* be taken on an application for a Certificate of Identity, provided such an application is filed. (See *Dulles v. Lee Ngan Lung*, 212 F. 2d 73, 76, 9 (C. A. 9, 1954).

Appellee has at all times since his Complaint was filed resided in Hong Kong, B. C. C. [R. 43]. For a considerable period after the repeal of §503, the District Courts were undecided as to whether they possessed authority to compel the Department of State to issue Certificates of Identity to allow plaintiffs to come to the United States to prosecute their actions. (Compare: *Wong Fon Haw v. Dulles*, 114 Fed. Supp. 906 (S. D. N. Y., 1953); *Wong Bick Ling v. Dulles*, 119 Fed. Supp. 513 (D. C. Dist. Col., 1954); *Yee Gwing Mee v. Acheson*, 108 Fed. Supp. 502 (N. D. Calif., 1952); and *Eng v. Acheson*, 108 Fed. Supp. 682 (S. D. N. Y., 1952) with *Wong Yoke Sing v. Dulles*, 116 Fed. Supp. 9 (E. D. N. Y., 1953); *Lee Mun Way v. Acheson*, 110 Fed. Supp. 64 (S. D. Calif., 1953); and *Look Yun Lin v. Acheson*, 95 Fed. Supp. 583 (N. D. Calif., 1951).) With this conflict existing, the following statement contained in an affidavit in support of appellant's Motion for a New Trial acquires added significance [R. 43]:

"* * * affiant did not know whether or not plaintiff would be issued a certificate of identity for the purpose of travelling to the United States to prosecute his action, as provided in Section 503 of the Nationality Act of 1940, 54 Stat. 1171, 8 U. S. C. A. §903; nor did affiant know or believe at that time that the court would proceed to trial in the absence of the plaintiff."

It was not until May 4, 1954 that this Court apparently resolved the conflict in this circuit (*Dulles v. Lee Gnan Lung*, 212 F. 2d 73, 75-76 (C. A. 9, 1954), rehearing denied May 4, 1954; but see *Chin Chuck Ming v. Dulles*, 225 F. 2d 849, 853 (C. A. 9, 1955), where *Look Yun Lin v. Acheson*, *supra*, ordering the issuance of a certificate of identity was cited with approval).

Appellant relied upon the admissibility of the results of appellee's blood test contained in a duly authenticated passport file relating to him [Ex. A] until the decision of the Court below on March 1, 1955 in *Ong Hong Way v. Dulles*, Civil No. 13,379 [R. 44]. This reliance had a reasonable legal basis (see discussion of admissibility on pp. 24 and 25 of App. Op. Br.). Appellant's misapprehension of existing law (assuming that the reasoning of the District Court in *Ong Hong Way v. Dulles* is correct), does not indicate a lack of due diligence. By way of analogy, a motion for new trial itself may be predicated upon a controlling decision which the moving party failed to bring to the attention of the Trial Court (*Sulzbacher v. Continental Casualty Co.*, 88 F. 2d 122 (C. C. A. 8, 1937)) or upon a controlling decision rendered after the decision of the Trial Court (*United States v. Bank of America*, 51 Fed. Supp. 751 (N. D. Calif., 1943)).

B. The Evidence Supporting Appellant's Motion for a New Trial Was Admissible.

The fact that appellee's parents were bloodtested pursuant to court order does not render the results of these tests inadmissible in evidence; since in the absence of some valid constitutional objection, all relevant evidence will be considered by the Court, no matter how obtained.

(*Olmstead v. United States*, 277 U. S. 438, 466-469 (1927); *Joong Sui Noon v. United States*, 76 F. 2d 249 (C. A. 8, 1935); *United States v. Lee Hee*, 60 F. 2d 924 (C. C. A. 2, 1932); *United States v. Wainer*, 49 F. 2d 789 (W. D. Pa., 1931); *In re Dooley*, 42 F. 2d 562 (S. D. N. Y., 1930).) Appellant submits that appellee's parents who submitted to blood tests under a Court order made under the authority of Rule 35, Federal Rules of Civil Procedure, were deprived of no constitutional right; even though this Court thereafter held in *Fong Sik Leung v. Dulles*, 226 F. 2d 74 (C. A. 9, 1955) that Rule 35 did not authorize such order. Blood tests are in essence no different from the taking of fingerprints and may properly be used as a means of identification. The prick of a finger is not "conduct that shocks the conscience" as forced stomach pumping was found to be in *Rochin v. California*, 342 U. S. 165, 172, or a method "revolting to the sense of justice", as a tortured confession was held in *Brown v. Mississippi*, 297 U. S. 278, 286. Although dealing with state prosecutions in *Rochin* the Supreme Court specifically held that it did not bring into question modern methods and devices that did not "legalize force so brutal and so offensive to human dignity in securing evidence" as it found forced stomach pumping to be. Certainly the extraction of a few drops of blood from an ear lobe or a finger tip to obtain the necessary sample is neither brutal nor offensive. (See, Maguire, "A Survey of Blood Group Decisions and Legislation in the American Law of Evidence, 16 So. Cal. L. Rev. 161, at pages 168 and 171.)

Even if it be assumed that the constitutional rights of appellee's parents were violated, appellee is in no position to complain. *The constitutional protection against un-*

lawful searches and seizures is a personal right to be asserted only by the person whose rights were violated. (Gibson v. United States, 149 F. 2d 381, 384 (C. A. Dist. Col., 1945), cert. den. 326 U. S. 724; Ingram v. United States, 113 F. 2d 966, 967 (C. C. A. 9, 1940); Lewis v. United States, 6 F. 2d 222 (C. C. A. 9, 1925). See also: Goldstein v. United States, 316 U. S. 114 (1942); Jeffers v. United States, 187 F. 2d 498 (C. A. Dist. Col., 1950), affirmed 342 U. S. 48.)

The suppression rule, which is an exception to the general principle that relevant evidence will be considered no matter how obtained (*Olmstead v. United States, supra*) arose from a motion to compel the return of property wrongfully seized. Manifestly, a person, such as appellee here, *has no standing to seek the return of property in which he has no proprietary or possessory interest. (Shields v. United States, 26 F. 2d 993, 996 (C. A. Dist. Col., 1928), nor to ask for the return of the property of a third person, Kelleher v. United States, 35 F. 2d 877, 879 (C. A. Dist. Col., 1929).*) IT WAS HIS APPELLEE'S PARENTS' BLOOD THAT WAS TAKEN, NOT HIS!

Nor was there a violation of appellee's rights of privacy under the Fourth Amendment. Only a person whose privacy has been invaded can complain of illegal wire tapping (*Goldstein v. United States, supra*); and if a witness waives his privilege against self-incrimination under the Fifth Amendment and the Court requires him to answer, a party to the action cannot object. (*Morgan v. Halberstadt, 60 Fed. 592 (C. C. A. 2, 1894), cert. den. 154 U. S. 511.*) By the same token, appellee has no right to complain of the search (blood tests) of his parents, if it can properly be said that there was a search. The constitutional rights of appellee himself were not violated

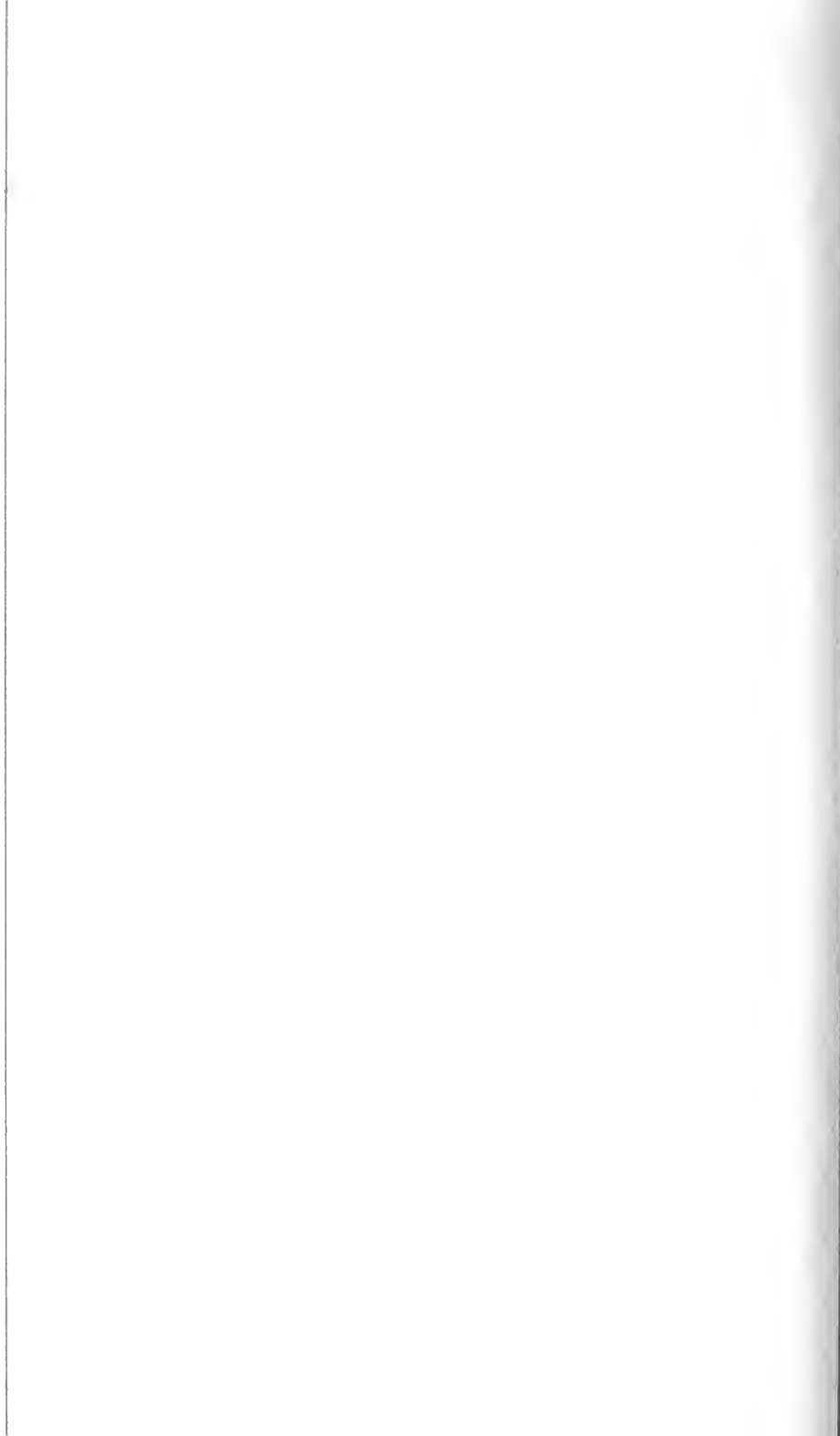
when blood samples were obtained from him on August 12, 1955 [R. 52-57]. Even if the drawing of these samples comes within a constitutional prohibition; appellee does not contend that the samples were taken by force or against his will. (Cf. *United States v. Mitchell*, 322 U. S. 65, 69, 70 (1944); *Young v. Territory of Hawaii*, 163 F. 2d 490 (C. C. A. 9, 1947).)

Respectfully submitted,

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JAMES R. DOOLEY,
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Attorneys for Appellant.



No. 15006
IN THE
United States Court of Appeals
FOR THE NINTH CIRCUIT

JOHN FOSTER DULLES, as Secretary of State,
Appellant,

vs.

QUAN YOKE FONG,
Appellee.

PETITION FOR REHEARING
AND
PETITION FOR REHEARING EN BANC.

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United States Attorney,

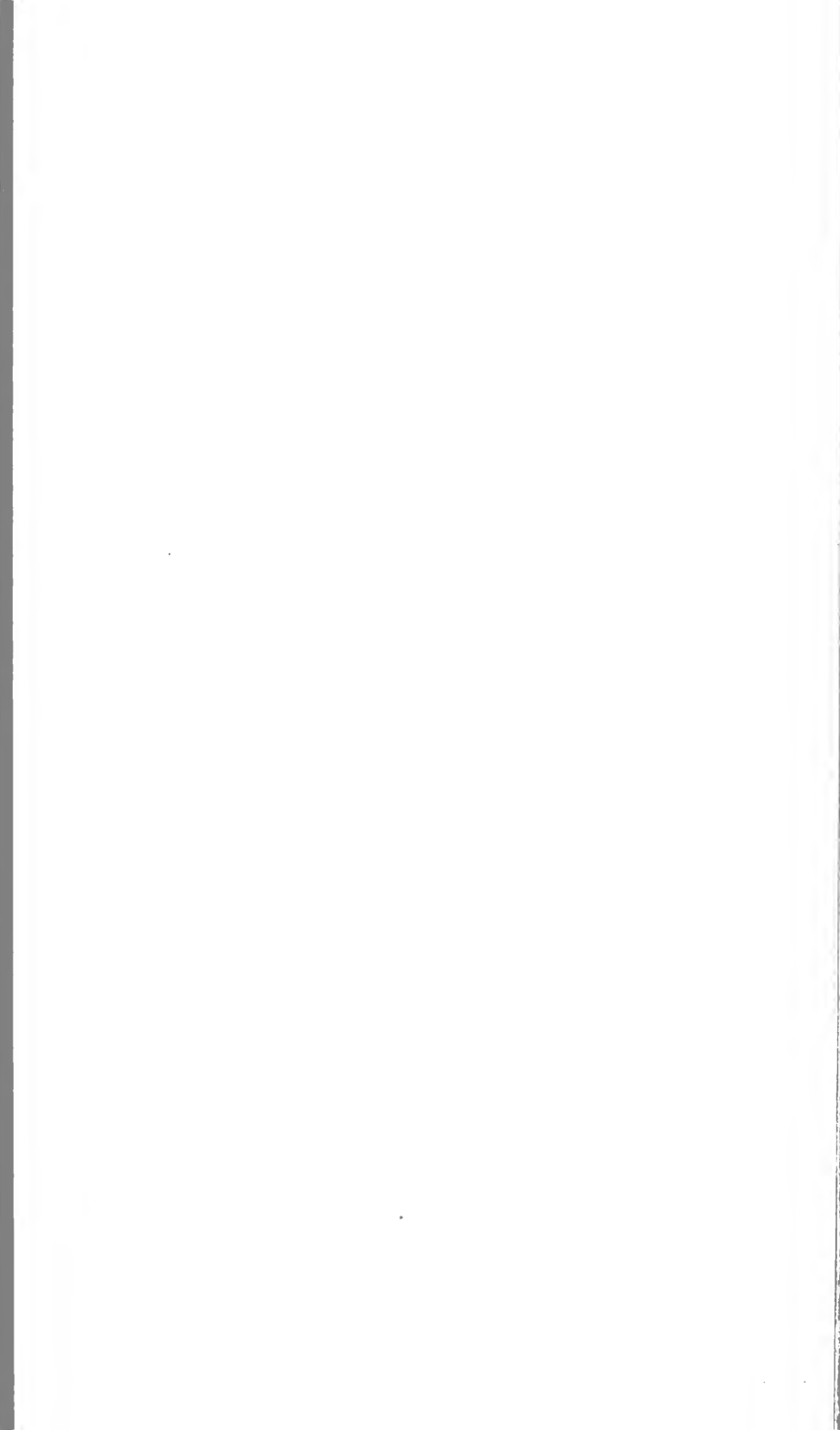
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No. 15006
IN THE
United States Court of Appeals
FOR THE NINTH CIRCUIT

JOHN FOSTER DULLES, as Secretary of State,
Appellant,
vs.
QUAN YOKE FONG,
Appellee.

**PETITION FOR REHEARING
AND
PETITION FOR REHEARING EN BANC.**

Grounds.

Appellant-petitioner, John Foster Dulles, as Secretary of State, respectfully petitions this Honorable Court for a rehearing of this appeal, and further petitions for a rehearing of this appeal en banc on the following grounds:

I.

The decision of this Court, if unchanged, will result in a serious miscarriage of justice, and therefore merits the consideration of the Court's entire panel.

II.

The reasoning of the majority in upholding the lower court's denial of appellant's motions is based upon an erroneous premise; since the use as evidence of the blood tests made of appellee's parents would result in no legal

wrong to appellee, and since no consideration was given by this Court to the blood tests made of appellee's parents in 1952.

III.

The majority opinion failed to consider appellant's contention that the District Court erroneously prevented appellant from presenting or offering any evidence that appellee's blood was incompatible with that of his alleged parents.

IV.

The ruling of this Court that the delay involved in processing appellee's passport application served to confer jurisdiction upon the District Court is unsound.

I.

The Decision of This Court, if Unchanged, Will Result in a Serious Miscarriage of Justice, and Therefore Merits the Consideration of the Court's Entire Panel.

According to blood tests made of appellee and his alleged parents, appellee's claim to citizenship of the United States is patently fraudulent. *These blood tests show that it is impossible for appellee to be the child of his alleged father, and consequently that it is impossible for appellee to be a citizen of the United States.*

Blood tests were made of appellee and his alleged parents upon two separate occasions, in 1952 and in 1955. The results of both groups of tests are identical. They both show that appellee cannot be the child of his pur-

ported father. Appellee, who was found to have group "O" cannot be the child of Quan Lun Hong, who has blood of group "AB." This is established by the most advanced medical authority [Medico-legal Application of Blood Grouping Tests," The Journal of the American Medical Association, June 14, 1952, Vol. 149, pp. 699-706], as well as by the Affidavit of Dr. Michael A. Ruinstein, contained in the record [R. 47-48].¹ Nevertheless, the Court below, by its judgment declared appellant to be a national and citizen of the United States, and this Court affirmed. The affirmance by this Court, if allowed to stand, will result in a serious miscarriage of justice, and will undoubtedly encourage the presentation of false claims to citizenship.

The present appeal, therefore, merits the consideration of the entire panel of this Court. Appellant recognizes that the "right to citizenship is a priceless thing" [*Wong Wing Foo v. McGrath*, 196 F. 2d 120, 122 (C. A. 9, 1952)]; and when a bona fide claim to citizenship is presented, the court should be vigilant to insure that it receives judicial recognition. But where, as in the case at bar, a claim which is patently fraudulent appears, the court should exercise equal vigilance to guard against imposition. All members of this Court, therefore, should consider this appeal, in order to determine whether one who, according to blood tests, cannot be a citizen of the United States, may nevertheless be judicially so adjudged.

¹"R" refers to Transcript of Record.

II.

The Reasoning of the Majority in Upholding the Lower Court's Denial of Appellant's Motions Is Erroneous.

A. The Results of the Blood Tests Made of Appellee's Parents During 1955 Were Admissible.

The majority seems to proceed upon the premise that since the blood tests made of appellee's parents on June 9, 1955 were pursuant to an order of court, the results of such tests were not admissible in evidence. Its Opinion states (p. 4 of Slip Opinion):

“* * * It was a *legal wrong to Fong* for the court to go outside its jurisdiction and compel his parents to give evidence against him.” [Emphasis added.]

The majority then went on to say (p. 4):

“In view of the fact that the father's affidavit states that his and his wife's blood was given under the compulsion of the court's order so made without its jurisdiction, *it would be futile to grant any motion to take the blood of Fong for comparison with theirs.* * * *” [Emphasis added.]

The above reasoning is at variance with the well-established rule of law that in the absence of some *valid constitutional objection*, all relevant evidence will be considered by the Court, no matter how obtained. [*Olmstead v. United States*, 277 U. S. 438, 466-469 (1927); *Joong Sui Noon v. United States*, 76 F. 2d 249 (C. A. 8, 1935); *United States v. Lee Hee*, 60 F. 2d 924 (C. C. A. 2, 1932); *United States v. Wainer*, 49 F. 2d 789 (W. D. Pa., 1931); *In re Dooley*, 42 F. 2d 562 (S. D. N. Y., 1930).]

Appellee's parents were deprived of no constitutional right. Their blood was tested pursuant to court order

on June 9, 1955. The subsequent decision of this Court in *Fong Sik Leung v. Dulles*, 226 F. 2d 74 (C. A. 9, 1955), holding that Rule 35, Federal Rules of Civil Procedure did not authorize such an order, did not render the blood testing of appellee's parents unconstitutional. [For a further discussion of constitutionality, see p. 7 of Appellant's Reply Brief.]

Moreover, even if it be assumed that the constitutional rights of appellee's parents were violated, appellant cannot complain. Only the person whose constitutional rights have been violated is in a position to complain. [*Gibson v. United States*, 149 F. 2d 381, 384 (C. A. Dist. Col., 1945), cert. den. 326 U. S. 724; *Ingram v. United States*, 113 F. 2d 966, 967 (C. C. A. 9, 1940); *Lewis v. United States*, 6 F. 2d 222 (C. C. A. 9, 1925). See also: *Goldstein v. United States*, 316 U. S. 114 (1942); *Jeffers v. United States*, 187 F. 2d 498 (C. A. Dist. Col., 1950), affirmed 342 U. S. 48; *Shields v. United States*, 26 F. 2d 993, 996 (C. A. Dist. Col., 1928); *Kelleher v. United States*, 35 F. 2d 877, 879 (C. A. Dist. Col., 1929); *Morgan v. Halberstadt*, 60 Fed. 592 (C. C. A. 2, 1894), cert. den. 154 U. S. 511; see page 8 of Appellant's Reply Brief for a more detailed discussion of the cases cited above.]

Fong Sik Leung v. Dulles, *supra*, is distinguishable. In that case complete blood tests of appellant and his parents were not available, since Fong Sik Leung refused to submit to a test. Consequently, the issue of whether the results of a test of Fong Sik Leung would have been admissible did not arise. In the case at bar, *complete blood tests are available of both appellee and his purported parents, showing that appellee cannot be the son of his alleged father*. If appellee's supposed par-

ents felt that submitting to a blood test violated their right to be free from restraint or interference, they could have refused to submit to a blood test, as was done in *Fong Sik Leung*. Thereafter, the propriety of their refusal could have been judicially determined during preliminary proceedings, enabling the defendant, if necessary, to present other available evidence of the blood types of appellee's parents. His parents having submitted to blood tests, however, *appellee cannot take advantage of a supposed wrong to his parents in order to judicially establish a right to citizenship to which he is not entitled*. Appellee's parents are not parties to this action [*Fong Sik Leung v. Dulles, supra*]; consequently *the rights of appellee and those of his alleged parents cannot be treated as identical*.

B. The Majority Failed to Consider the Blood Tests Made of Appellee's Parents During 1952.

The majority opinion omits any reference to the blood tests made of appellee's parents during 1952. On September 24, 1952, appellee's parents voluntarily submitted to blood tests conducted by the West Coast Medical Laboratories. The results of these tests were identical with the tests made in 1955. [Compare reports dated September 24, 1952 contained in the passport file relating to appellee, Exhibit "A", with the results of the 1955 tests as disclosed by the Affidavit of Albert L. Blifeld (R. 45-47).] As is more fully discussed in Appellant's Opening Brief [pp. 23-24], the 1952 blood tests of appellee's parents are available, and it is unnecessary to rely upon the 1955 tests. Thus, for an additional reason, the statement in the majority opinion that "it would be futile to grant any motion to take the blood of Fong for comparison" is unsound.

III.

The Majority Opinion Failed to Consider Appellant's Contention That the District Court Erroneously Prevented Appellant From Presenting or Offering Any Evidence That Appellee's Blood Was Incompatible With That of His Alleged Parents.

This contention of appellant is discussed in full at pages 2 through 26 of its Opening Brief; however, the majority opinion makes no reference to it. When the hearing of June 1, 1956 was calendared, *it was the understanding of both counsel and the District Court that the hearing was to constitute only a partial trial* in order to obtain the testimony of appellee's mother before her departure to Hong Kong [R. 61-63]. Since it was clearly understood that the hearing of June 1, 1956 would constitute only a partial trial, appellant made no effort at that time to offer the evidence then available to show that appellee's blood was incompatible with that of his alleged parents. When the hearing of June 1, 1955 was concluded, *the Court made it clear that the case was not yet submitted; that a further hearing would be held; and that decision would be held in abeyance until blood tests were received* [R. 139, 140, 143, 145]. At no time did appellant either open or rest his case.

Yet on August 16, 1955, the Trial Court, without a further hearing, denied appellant's motion for a supplemental order to require appellee to furnish a blood sample, which had been made on July 1, 1955, and ordered judgment for appellee. The Court refused to continue the matter to allow appellant to present evidence of the re-

sults of blood tests of appellee and his alleged parents, and further refused to permit appellant to make an offer of proof as to such evidence [R. 147-148].

The District Court by its action erroneously prevented appellant from presenting or offering *any* evidence to show that appellee's blood was incompatible with that of his alleged parents. *Refusal to allow a party to present his defense deprives of a fair hearing and constitutes reversible error.* [*Republic National Bank v. Crippen*, 224 F. 2d 565 (C. A. 5, 1955); *L. B. Wilson, Incorporated v. Federal Communications Commission*, 170 F. 2d 793 (C. A. Dist. Col., 1948).]

IV.

The Ruling of This Court That the Delay Involved in Processing Appellee's Passport Application Served to Confer Jurisdiction Upon the District Court Is Unsound.

The majority opinion, after noting that appellee's passport application was filed on May 13, 1952, declared that: "Nothing was done in this over-seven-month period . . ." This statement is not supported by the record. The passport file relating to appellee [Exhibit A] discloses that on July 21, 1952, the American Consulate General requested the District Director, Immigration and Naturalization Service, Los Angeles, California, to blood-test appellee's alleged parents, and that on September 24, 1952 they submitted to blood tests conducted by West Coast Medical Laboratories; that on October 21, 1952, appellee himself was blood-tested by Dr. Eric Vio in Hong

Kong, B. C. C.; and that on October 28, 1952, appellee was interviewed. Since this Court's decision was undoubtedly based upon the erroneous premise that "nothing was done" during the period of delay, the jurisdictional issue merits reconsideration.

Congress manifested an intent that an administrative determination of United States nationality and/or citizenship should precede the issuance of a passport [see discussion on pp. 10-11 of Appellant's Opening Brief]. Therefore, appellee, when he filed his passport application did not acquire an immediate "right" to the issuance of a passport; nor did he acquire an immediate "right" to a determination of his claim to citizenship. *He was only entitled to have his claim processed in accordance with normal administrative procedures, considering all the facts and circumstances of the case.* From the administrative steps described above, it appears that appellee was accorded this right.

The majority opinion assumes, appellant believes erroneously, that additional funds would have eliminated the congestion of the administrative calendar at the American Consulate at Hong Kong. However, the unavailability of qualified personnel, insufficient housing for office space and personnel, and the necessity, due to the claimants' place of birth and prior residence, to verify their nationality status through other than official sources, are factors which, even though funds were unlimited, would have delayed elimination of congestion [pp. 5-6, Exhibit B].

Conclusion.

It is respectfully submitted that the decision in this case, if allowed to stand, will result in a grave miscarriage of justice. One who according to blood tests cannot be the son of his purported father, and thus cannot be a citizen of the United States, will have been judicially declared a citizen. Fraudulent claims to citizenship will thereby be encouraged and the ends of justice thwarted.

Wherefore, it is respectfully submitted that only by granting a rehearing before the entire panel of this Court can justice be done.

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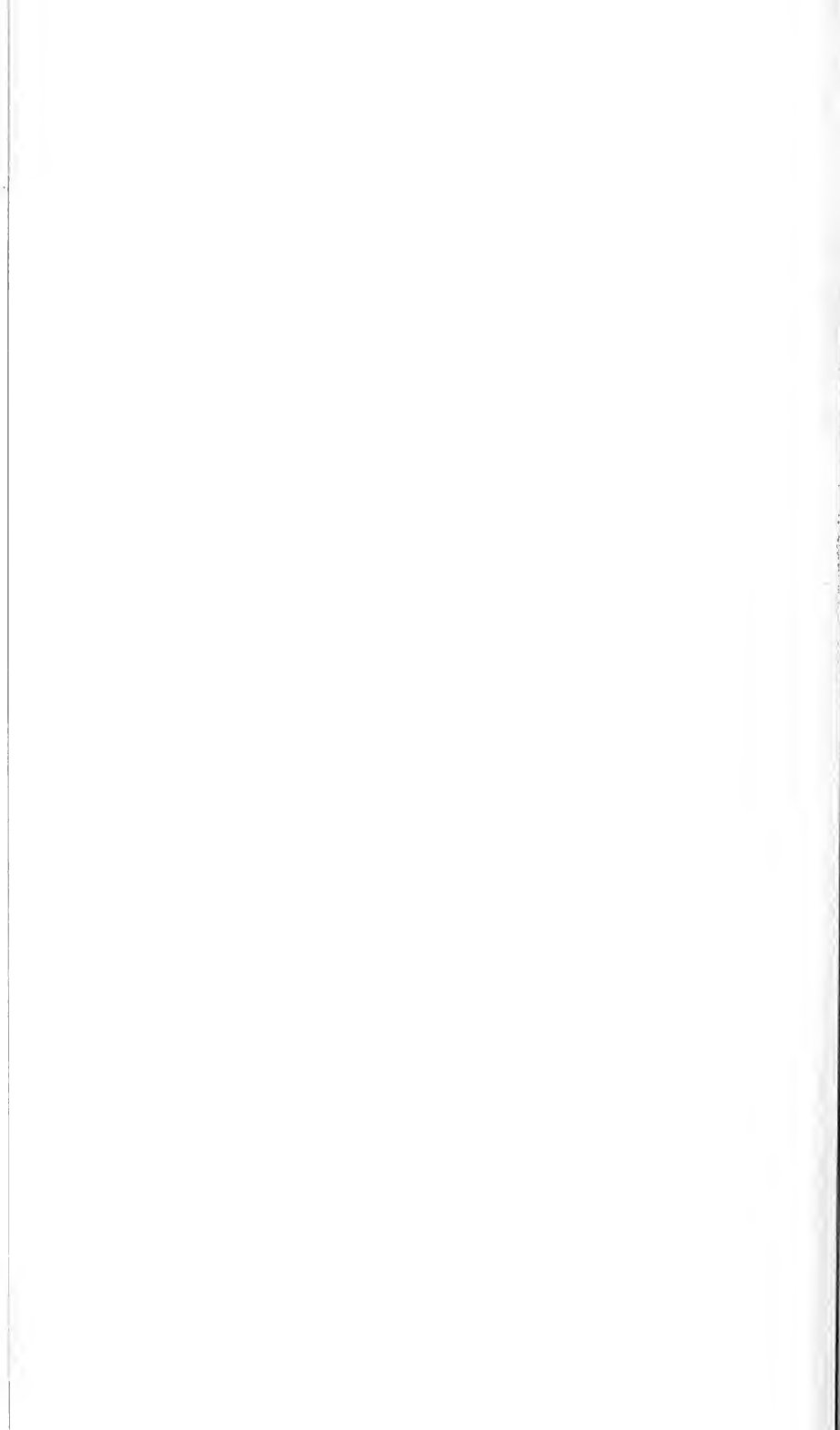
JAMES R. DOOLEY,
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Attorneys for Appellant.*

Certificate of Counsel.

I, JAMES R. DOOLEY, one of the counsel for Petitioner in the above entitled action, hereby certify that the foregoing Petition for Rehearing and Petition for Rehearing En Banc is presented in good faith and not for delay, and in my opinion is well-founded in law and in fact, and proper to be filed herein.

JAMES R. DOOLEY,

Assistant U. S. Attorney.



No. 15007

United States
Court of Appeals
for the Ninth Circuit

BENMATT ORGANIZATION, INC.,
Appellant,
vs.

UNITED STATES OF AMERICA,
Appellee.

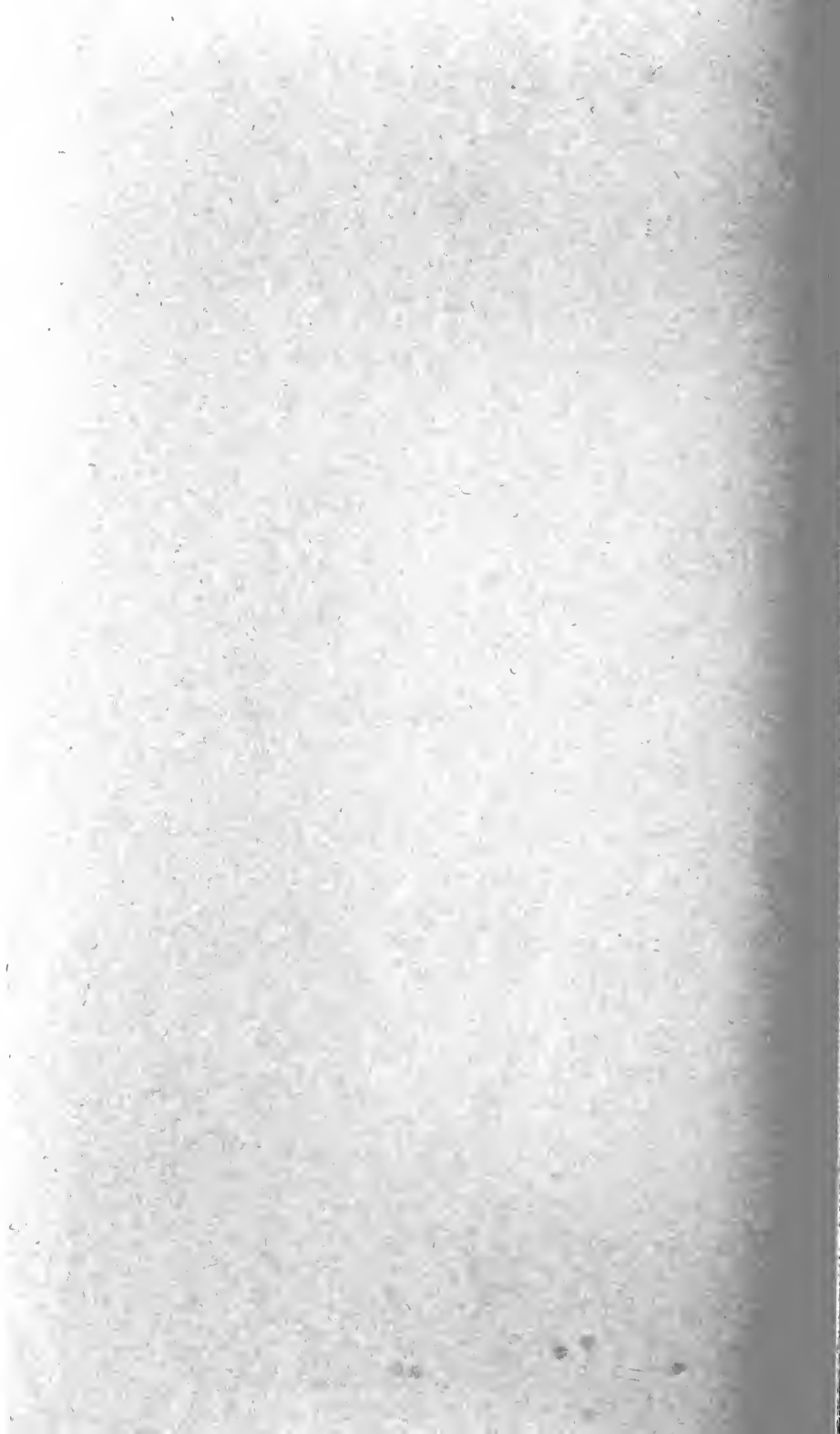
Transcript of Record

Appeal from the United States District Court for the Southern
District of California, Central Division

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No. 15007

United States
Court of Appeals
for the Ninth Circuit

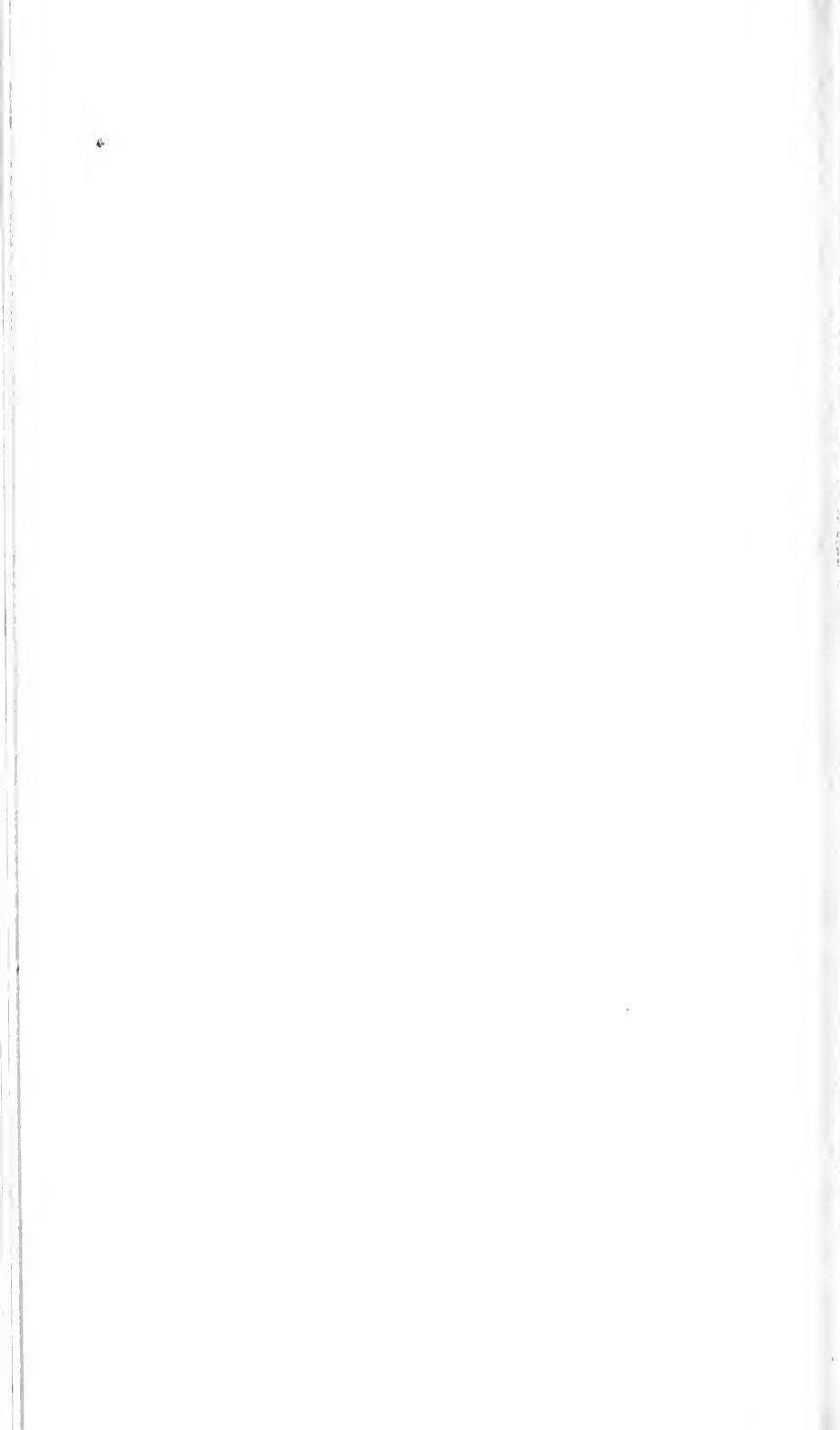
BENMATT ORGANIZATION, INC.,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

Transcript of Record

Appeal from the United States District Court for the Southern
District of California, Central Division



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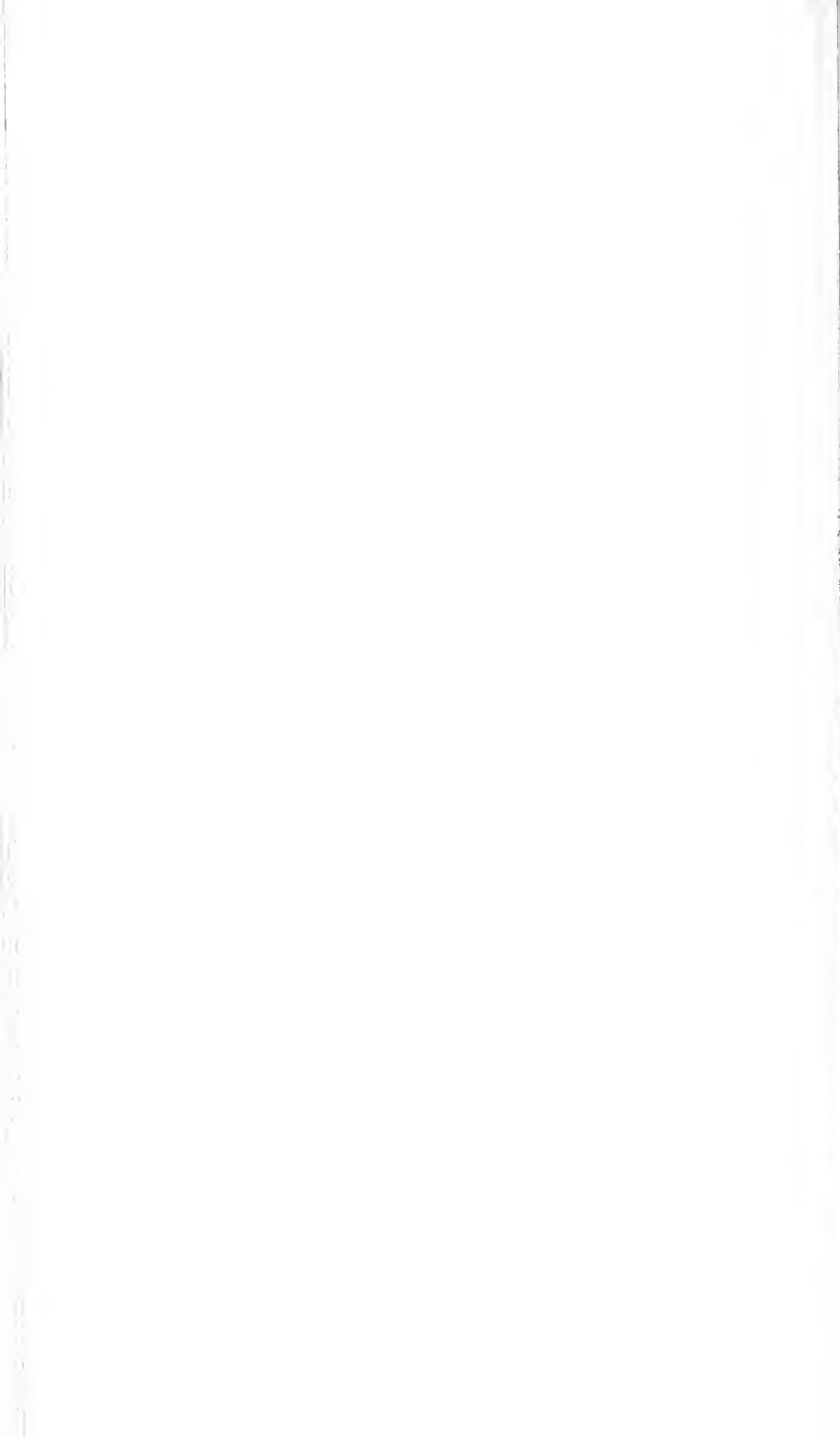
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* Page numbers appearing at foot of page of original Transcript of Record.



In the District Court of the United States, South-
ern District of California, Central Division

No. 16905-BH

BENMATT ORGANIZATION, INC.,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

COMPLAINT

(For refund of Manufacturers Excise Tax)

Comes now the above named plaintiff and for
cause of action against the above named defendant,
alleges:

I.

Plaintiff is a corporation incorporated under the
laws of the State of California, having its principal
place of business at 3447 East Fifteenth Street, Los
Angeles 23, California.

II.

Harry C. Westover, hereinafter referred to as
Collector Westover, was the duly appointed, quali-
fied and acting Collector of Internal Revenue for
the Sixth Collection District of California from
July 1, 1943 to October 31, 1949, inclusive. Robert
A. Riddell, hereinafter referred to as Collector
Riddell, was the duly appointed, qualified and act-
ing Collector of Internal Revenue for said district
from November 1, 1949, to April 30, 1950, inclusive,
and was the duly appointed, qualified and acting
Collector of Internal Revenue for said district from

May 1, 1950, to November 25, 1952, inclusive, and at all times from, and including November 26, 1952, has been and is now Director of [2] Internal Revenue, Los Angeles district, State of California.

III.

At all times prior to November 1, 1947, to March 31, 1951, inclusive, plaintiff was engaged in the business of manufacturing and selling, among other things, automobile dealer identification plates in California and throughout the United States. This business was conducted at 3447 East Fifteenth Street, Los Angeles 23, California, under its own name.

IV.

Within the time prescribed by law, plaintiff duly filed with the incumbent Collector, or acting Collector, of Internal Revenue for the Sixth District of California, at Los Angeles, a manufacturers excise tax return for each calendar month in the period from November 1, 1947, to March 31, 1951. Plaintiff reported in these returns receipts from certain of its operation (manufacture and sale of automobile dealer identification plates) as being subject to the manufacturers excise tax imposed by Section 3403 of the Internal Revenue Code. Accompanying each such return, plaintiff transmitted to said Collector a check in payment of the amount shown on the return as such manufacturers excise tax for the month in question. The amount so paid for each month, the date of the check issued in payment and the month for which the payment was

made are set forth in the schedule attached hereto as Exhibit "A" and hereby made a part hereof.

V.

Plaintiff, by such monthly payments, beginning November 1, 1947, and ending March 31, 1951, inclusive, paid manufacturers excise taxes in the sum of \$98,747.04 under Section 3403 of the Internal Revenue Code on automobile dealer identification plates manufactured and sold by it. Said sum was duly assessed by the Commissioner of Internal Revenue on plaintiff's returns during the period involved herein.

VI.

Plaintiff alleges that the taxes so paid on amounts received on account of its sale of automobile dealer identification plates from November 1, [3] 1947, to March 31, 1951, inclusive, were erroneously and illegally paid and collected and that plaintiff is entitled to a refund thereof.

VII.

Plaintiff alleges that the automobile dealer identification plates manufactured and sold by it from November 1, 1947, to March 31, 1951, inclusive, were manufactured and sold to automobile dealers solely for advertising purposes and do not constitute automobile parts or accessories within the meaning of Section 3403 of the Internal Revenue Code; that the plates were sold upon special order and gave the name and address of the automobile dealer for the

purpose of identifying and advertising the dealer's place of business; that the automobile dealer's name was molded into the plate and could not be changed so as to permit any other dealer to use the name; and that the automobile dealers directly charged the cost of such plates to advertising expense on their accounting records.

VIII.

On or about December 31, 1951, plaintiff duly filed with the Collector, Robert A. Riddell, at Los Angeles, California, a duly executed claim for refund in the amount of \$98,747.04, theretofor paid by the plaintiff as manufacturers excise tax on account of certain of its operations in the months of November 1947 to March 1951, inclusive, as set forth above; that said claim for refund was filed on official Form 843 within the time and in the manner provided by law, and stated it should be allowed for the following reasons:

"The Commissioner of Internal Revenue has erroneously and illegally collected manufacturers Excise Tax pursuant to provisions of Section 3403, I.R.C., on automobile dealer identification plates sold by the deponent during the period November 1947 to March 1951, inclusive. These identification plates are sold primarily for advertising purposes and do not constitute automobile parts or accessories within the meaning of [4] Section 3403 of Internal Revenue Code. For detail of sales and of payment and amount of refund per month see schedule attached hereto and made a part hereof."

IX.

By registered mail, notice dated August 5, 1952, the Commissioner of Internal Revenue notified plaintiff of the disallowance in full of the refund claim filed by it as set forth above. No part of the taxes represented and paid by plaintiff from November 1, 1947, to March 31, 1951, inclusive, has been refunded to the plaintiff.

X.

Plaintiff included the manufacturers excise tax in the price of automobile dealer identification plates and passed such tax on to the ultimate purchaser, namely, the automobile dealers.

XI.

Plaintiff, prior to filing this complaint and as a prerequisite to bringing this suit, filed with the Commissioner of Internal Revenue written consents, duly executed by the ultimate purchaser (automobile dealers) to allowance of such refunds in the amount of \$38,284.84, in compliance with the provisions of Section 3443 (d) of the Internal Revenue Code. \$8,501.78 of this amount was paid to Collector Westover during the months of November 1947 to October 31, 1949, inclusive.

XII.

No part of the manufacturers excise taxes reported and paid by plaintiff to Collector Westover for the months of November 1947 to October 31, 1949, inclusive, has been refunded to plaintiff. There

is now due and owing from defendant to plaintiff \$8,501.78 as taxes illegally paid by and collected from plaintiff as set forth above, together with interest on said sum as provided by law.

Wherefore, plaintiff prays judgment in favor of plaintiff and against defendant as follows: [5]

1. For the sum of \$8,501.78 for said taxes erroneously and illegally collected from it and not refunded, together with interest on said sum as provided by law.

2. For plaintiff's cost of suit and for such other and further relief as may be just and proper in the premises.

Dated this 1st day of July, 1954, Los Angeles, California.

RILEY and HALL,
/s/ By B. H. NEBLETT,
Attorneys for Plaintiff [6]

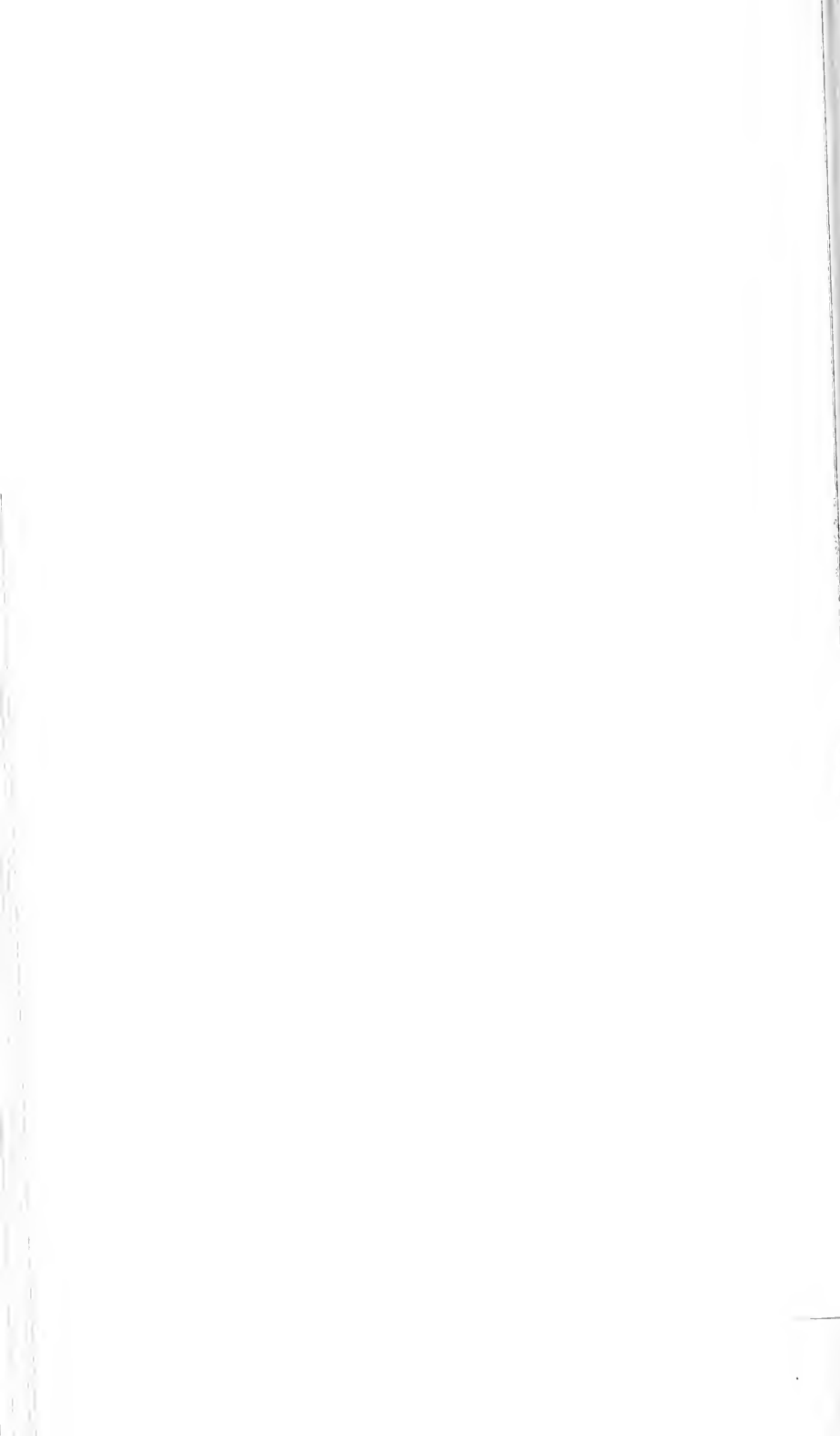
Duly Verified. [8]

[Endorsed]: Filed July 7, 1954.

THE HONEST ORGANIZATION, INC.
3447 East 19th Street Los Angeles 28, Calif.

STATEMENT OF REVENUE TAX PAID

DATE	Amount Paid For Return	Date Paid	Total From Sales	Transfer Sales (Dist. License Guarantee)	Non-Transfer From Sales	Tax Should Be	Tax Overpaid
1/17	2,008.98	12-30-47	40,845.07	4,764.89	36,080.18	237.34	1,771.44
1/17	1,934.57	1-27-48	38,125.81	6,191.54	31,934.27	309.58	1,664.99
1/18	2,082.93	2-23-48	40,999.36	4,511.62	36,487.74	225.99	1,827.34
	2,144.26	3-16-48	42,708.57	6,587.83	36,120.74	329.99	1,814.87
	3,007.60	4-27-48	39,318.19	7,021.84	32,296.35	321.24	2,626.36
	2,238.63	5-28-48	44,595.36	7,021.97	37,573.39	351.08	1,887.93
	2,255.36	6-29-48	44,954.51	6,207.33	38,746.98	310.38	1,945.18
	1,973.67	7-30-48	38,945.89	4,798.44	34,147.45	239.92	1,733.75
	2,010.44	8-27-48	40,087.72	5,705.24	34,382.48	285.26	1,725.18
	2,867.08	9-28-48	58,383.99	8,795.98	49,588.01	439.80	2,427.28
	2,067.02	10-29-48	41,425.10	6,242.73	35,182.37	312.14	1,754.88
	1,799.87	11-30-48	36,052.67	8,016.77	28,035.90	400.84	1,399.05
	2,053.55	12-27-48	41,488.30	6,579.48	34,908.82	328.97	1,724.58
	2,540.49	1-28-49	51,005.05	9,106.97	41,898.08	455.35	2,083.14
1/19	2,760.65	2-25-49	60,237.75	8,948.54	49,924.08	447.43	2,313.22
	2,480.80	3-28-49	51,369.49	10,087.19	41,282.30	304.36	1,976.44
	3,120.40	4-25-49	73,744.95	11,989.75	61,755.20	399.49	2,820.91
	3,880.61	5-27-49	80,530.38	3,496.51	76,767.42	174.83	3,705.78
	2,500.61	6-29-49	51,793.77	3,205.35	50,137.02	160.27	2,340.34
	2,251.80	7-19-49	39,369.88	11,279.90	28,089.98	264.00	1,687.80
	2,314.85	8-30-49	38,195.68	9,886.36	28,309.32	494.32	1,820.33
	2,382.91	9-26-49	43,020.64	9,980.32	33,040.32	499.02	1,883.89
	2,438.87	10-28-49	47,804.17	5,395.01	42,409.16	264.75	2,174.12
	2,194.45	11-30-49	44,005.34	4,547.93	39,457.41	227.40	1,967.05
	2,595.47	12-21-49	52,398.19	3,045.51	49,352.68	152.28	2,443.19
	3,942.15	1-12-50	79,183.31	4,619.05	74,564.26	230.95	3,711.20
1/50	3,194.02	2-21-50	63,522.56	5,345.09	58,177.47	267.25	2,926.77
	2,938.78	3-20-50	58,269.44	7,228.73	51,040.71	361.44	2,577.34
	3,000.00	4-21-50	56,998.29	10,021.88	46,976.41	501.09	2,496.91
	3,199.65	5-24-50	62,243.44	12,629.33	49,614.11	631.47	2,568.18
	3,727.17	6-21-50	69,921.97	15,966.30	53,955.67	796.32	2,928.85
	3,681.66	7-25-50	68,743.68	15,268.44	53,475.24	763.42	2,918.24
	3,227.40	8-28-50	57,461.03	13,161.67	44,299.36	698.08	2,569.32
	3,641.14	9-27-50	62,911.58	18,381.04	44,530.54	919.05	2,722.09
	2,609.91	10-24-50	49,750.72	7,648.48	42,102.24	382.42	2,227.49
	3,554.08	11-22-50	65,795.15	7,786.86	58,008.29	389.34	3,164.74
	3,234.79	12-26-50	66,442.40	14,223.64	52,218.76	711.18	2,523.61
	3,174.31	1-24-51	59,561.00	12,322.07	47,238.93	616.10	2,558.21
1/51	4,294.45	2-27-51	83,451.43	14,520.49	68,930.94	726.02	3,568.43
	5,669.24	3-28-51	107,969.32	22,919.75	85,049.57	1,145.99	4,523.25
	4,243.54	4-26-51	74,892.32	19,883.36	55,008.96	994.17	3,249.37
L 3	\$ 117,508.36		\$ 2,287,680.27	\$ 374,226.18	\$ 1,913,454.09	\$ 18,761.32	\$ 28,747.04



[Title of District Court and Cause.]

ANSWER

Comes now the defendant in the above entitled action and, in answer to plaintiff's complaint, admits, denies and alleges:

I.

Admits the allegations contained in paragraph I of the complaint.

II.

Admits the allegations contained in paragraph II of the complaint.

III.

Admits the allegations contained in paragraph III of the complaint and avers that the plaintiff also manufactured and sold automobile license plate frames, some of which bore the name of an automobile dealer.

IV.

Denies the allegations contained in paragraph IV of the complaint except admits that the plaintiff duly filed manufacturers [9] excise tax return for each calendar month from November 1947 through March 1951 except for the month of March of 1948 and further admits that the taxes reported on each of the returns so filed were paid.

V.

Denies the allegations in the first sentence of paragraph V of the complaint except admits or avers that for the period November 1947 through

March 1951, the plaintiff paid manufacturers excise taxes on automobile license plate frames pursuant to Section 3403 of the Internal Revenue Code in the amount of \$114,500.76.

VI.

Denies the allegations contained in paragraph VI of the complaint.

VII.

Denies the allegations contained in paragraph VII of the complaint except denies any knowledge or information sufficient to form a belief as to the plaintiff's method of manufacturing automobile license plate frames or as to the accounting procedures of plaintiff's customers.

VIII.

Admits the allegations contained in paragraph VIII of the complaint except denies the allegations quoted from the claim for refund.

IX.

Admits the allegations contained in paragraph IX of the complaint.

X.

Denies the allegations contained in paragraph X of the complaint except admits or avers that the plaintiff included the manufacturers excise tax in the price of automobile license plate frames and passed such tax on to the ultimate purchaser; however, [10] defendant denies any knowledge or in-

formation sufficient to form a belief as to who the ultimate purchasers were.

XI.

Defendant has no knowledge or information sufficient to form a belief as to who the ultimate purchasers of the taxed articles were and hence denies the truth of the allegations contained in paragraph XI of the complaint except that defendant admits that the plaintiff filed written consents in certain amounts executed by some certain parties.

XII.

Admits the allegations contained in the first sentence of paragraph XII, but denies the allegation contained in the second sentence of that paragraph.

Wherefore, having fully answered, defendant prays for judgment in its favor and for its costs and disbursements in this action.

LAUGHLIN E. WATERS,

United States Attorney

EDWARD R. McHALE,

Asst. U. S. Attorney, Chief, Tax
Division

BRUCE I. HOCHMAN,

Asst. U. S. Attorney

/s/ BRUCE I. HOCHMAN,

Attorneys for Defendant

[11]

Affidavit of Service by Mail attached. [12]

[Endorsed]: Filed February 7, 1955.

[Title of District Court and Causes Nos. 16905-6.]

STIPULATION OF FACTS

It Is Hereby Stipulated by and between the parties hereto that the following facts may be taken to be true, subject to the right of either party to object to the materiality, relevancy or competency of any of the matters set forth herein and subject to the further right of any party to explain, amplify any of the matters set forth herein.

I.

The automobile dealers who have signed the Statements of Ultimate Consumers upon which this refund suit is based, are, in fact, the ultimate consumers of license plate frames upon which the excise tax was imposed.

II.

The automobile dealers who have signed the Statements of Ultimate Consumers did not resell the frames.

III.

The automobile dealers who have purchased the license plate frames involved in this suit treated the cost of such frames as an [13] advertising or other expense on their respective books and records, and did not charge their customers for them.

IV.

A few automobile dealers whose claims are not involved in the case at bar did sell a few of the

frames herein involved and designated as Exhibit 1-a post.

V.

There will be offered into evidence three license plate frames, which are indicative of the types of frames manufactured and sold by the plaintiff. These are marked Plaintiff's Exhibit 1-a, 1-b and 1-c and are described as follows: 1-a: License plate frames involved in this refund suit; 1-b: License plate frames bearing the name of a particular state not sued upon by plaintiff; and 1-c: License plate frames bearing no identification as to dealer, city, or other thing or person, not sued upon by plaintiff.

VI.

There will be offered into evidence, as Plaintiff's Exhibit 2, a copy of a typical billing to an automobile dealer (Ultimate Consumer) for license plate frames, which shall be regarded as a typical billing for all the frames involved in this suit.

VII.

The refund claims sued upon were timely and properly filed.

VIII.

If the General Manager of Pep Boys, Western Auto Supply, or Sears Roebuck and Co., which concerns among other things deal in auto accessories, took the stand in this case and was sworn, he would testify as follows:

(a) That his firm handles the license plate frames which are marked plaintiff's Exhibit 1-b and 1-c;

(b) That such frames are sold to their customers in the normal course of their business; and

(c) That these frames designated as plaintiff's Exhibits 1-b and 1-c are advertised by the above [14] firms as commodities to be purchased for the adornment of automobiles, the protection of license plates, and the complementing of the chrome otherwise to be found on the automobile.

Dated this 8th day of September, 1955.

LAUGHLIN E. WATERS,
United States Attorney

EDWARD R. McHALE,
Assistant U. S. Attorney, Chief, Tax
Division

BRUCE I. HOCHMAN,
Assistant U. S. Attorney

/s/ BRUCE I. HOCHMAN,
Attorneys for United States of
America

RILEY & HALL,
/s/ By B. H. NEBLETT,
Attorneys for Plaintiff [15]

[Endorsed]: Filed September 9, 1955.

[Endorsed]: Plaintiffs' Exhibit No. 3, Filed September 12, 1955.

[Title of District Court and Causes Nos. 16905-6.]

OPINION

Appearances: Riley and Hall, B. H. Neblett, William T. Huston, Attorneys for Plaintiff. Laughlin E. Waters, U. S. Attorney, Edward R. McHale, Bruce I. Hochman, Asst. U. S. Attorneys, Attorneys for Defendant. [16]

These two consolidated actions involve manufacturers' excise taxes from November 1, 1947, through March 31, 1951, in the amount of \$38,284.84, together with interest as provided by law. The sole question involved is whether license plate frames bearing an advertisement are "automobile accessories" within the meaning of §3403(c) of the Internal Revenue Code of 1939 [now §§4061, 4062 and 4063 of the Internal Revenue Code].

Section 3403 at the time these excise taxes became due provided as follows:

"There shall be imposed upon the following articles sold by the manufacturer, producer, or importer, a tax equivalent to the following percentages of the price for which so sold:

"(c) Parts or accessories (other than tires and inner tubes) for any of the articles enumerated in subsection (a) or (b), 2 per centum. For the purposes of this subsection and subsections (a) and (b), spark plugs, storage batteries, leaf springs, coils, timers, and tire chains, which are suitable for use on or in connection with, or as component parts

of, any of the articles enumerated in subsection (a) or (b) shall be considered parts or accessories for such articles, whether or not primarily adapted for such use. * * *

Treasury Regulation 46 (1941), §316.55, restated in Federal Tax Regulations (1955) at page 1176, provides in part as follows:

“(a) The term ‘parts or accessories’ for an automobile truck or other automobile chassis or body, taxable tractor, or motorcycle, includes (1) any article the primary use of which is to improve, repair, replace, or serve as a component part of such vehicle or article, (2) any article designed to be attached to or used in connection with such vehicle or article to add to its utility or ornamentation, and (3) any article the primary use of which is in connection with such vehicle or article whether or not essential to its operation or use. However, such term does not include tires, inner tubes, or [17] automobile radio or television receiving sets, since these articles are expressly excluded by the statute from the tax on parts or accessories. With respect to fare registers and fare boxes for use on busses and automobiles, see §316.140.

“(b) The term ‘parts and accessories’ shall be understood to embrace all such articles as have reached such a stage of manufacture that they are commonly or commercially known as parts and accessories whether or not fitting operations are required in connection with installation. * * *

Plaintiff without dispute is the manufacturer of

three types of license plate frames. One type is for dealers advertising the dealer's name, the second has the name of the state or city, and the third is plain.

Plaintiff only seeks a refund on the first type. It has paid excise taxes on the second and third kind.

It contends that the first type is an advertising device and therefore cannot come within the purview of an automobile accessory inasmuch as the dealer-purchaser gives the frames to his customers without charge.

The evidence in this case discloses that automobile license frames can be purchased at any automobile accessory store, which in itself indicates their classification by the trade.

In *Masterbilt Products Corp. vs. U. S. A.*, 42 F.Supp. 294, the Court of Claims stated:

"The Supreme Court in the case of *Universal Battery Co. vs. United States*, 281 U.S. 580, 584, 50 S.Ct. 422, 423, 74 L.Ed. 1051, prescribed a rule for determining what devices were subject to tax. This rule was as follows: '* * * It is that articles primarily adapted for use in motor vehicles are to be regarded as parts or accessories of such vehicles, even though there has been some other use of the articles for which they are not so well adapted.'"

[See also Words and Phrases under definition of "accessory" as well as Webster's Dictionary]. [18]

It appears to me that the license plate frames in dispute are primarily adapted for use on motor vehicles. They are constructed to be affixed to auto-

mobiles by bolts, add to the utility and become a component part of the automobile as well as an ornament.

License plate frames are in common use and are as familiar to an automobile user as any other part of the vehicle. They also protect the license plate from the elements and prevent vibration. It is my view that the use of frames is so widely known that the court can take judicial notice of their utility and use as well as the ornamentation [*Cadwalader vs. Zeh*, 151 U.S. 171, 176, 14 S.Ct. 288, 38 L.Ed. 115.]

The plaintiff has recognized that frames without the advertising matter inserted on the body of the frames are subject to the tax by paying the same and not seeking a refund. But, the plaintiff contends that because the frame is given to the purchaser of an automobile without charge by the seller of the motor vehicle, providing it carries an advertisement designating the name of the dealer, it is no longer an accessory but an advertisement for the benefit of the seller.

To put the same more clearly, plaintiff contends that an accessory ceases to be an accessory when an advertising plate is affixed thereto. Hub caps would be exempt under the same theory. A package of matches continues to be a package of matches notwithstanding the package carries an advertisement.

Plaintiff places great reliance upon *Smith vs. McDonald*, 214 F.2d 920. In that case plaintiff manufactured an electric sign designed to be at-

tached by suction cups to the tops of taxicabs. The signs were [19] illuminated by electric bulbs and were purchased only by taxicab operators. The sign indicated whether the taxicab was vacant or other information that would be sought by prospective customers. The court held that the signs on taxicabs were analogous to the character for use of taxicab meters on taxicabs and were not subject to excise tax as an automobile accessory. With this holding we have no quarrel but fail to see its application to this case. It must be remembered that each case depends upon the particular facts under consideration. [Cuno Engineering Corporation vs. United States, 43 F.2d 259, 262.]

A license plate frame is a license plate frame whether it bears an advertisement or not. A rose by another name does not cease to be a rose.

Plaintiff has overlooked the fact that we are dealing with an excise tax on the manufacturer, which in effect is a sales tax at the source not a retailer's sales tax. The tax is on the sale price of the manufactured article and not on the use it is put to by the dealer-purchaser. The manufacturer makes these frames for a purpose and a price. Whether the dealer-purchaser gives them to his customers or sells them is immaterial to any issue in this case. [Williams vs. Harrison, 110 F.2d 989; 51 Am. Juris. p. 61; 33 C.J.S. p. 111.]

Plaintiff shall take nothing by reason of these actions and defendant is entitled to a judgment of dismissal. Counsel for defendant is directed to pre-

pare and submit to me within ten days its proposed findings and judgment.

Dated: This 3rd day of October, 1955.

/s/ BEN HARRISON,

Judge

[20]

[Endorsed]: Filed October 3, 1955.

[Title of District Court and Cause No. 16905.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above-entitled cause came on regularly for trial on the 12th day of September, 1955, before the Honorable Ben Harrison, sitting without a jury; plaintiff appearing by its attorneys Riley and Hall, by B. H. Neblett and William Huston, Esquires, and the defendant appearing by its attorneys Laughlin E. Waters, United States Attorney for the Southern District of California, Edward R. McHale, Assistant United States Attorney, Chief, Tax Division, and Bruce I. Hochman, Assistant United States Attorney; and evidence both oral and documentary having been received and the Court having fully considered the same, hereby makes the following Findings of Fact and Conclusions of Law:

Findings of Fact

I.

The plaintiff is a corporation incorporated under

the laws of the State of California, having its principal place of business at 3447 E. 15th Street, Los Angeles 23, California. [21]

II.

At all times prior to November 1, 1947, to March 31, 1951, inclusive, the plaintiff was engaged in the business of manufacturing and selling, among other things, license plate frames for sale in California and throughout the United States.

III.

Plaintiff, by monthly payments beginning November 1, 1947, and ending March 31, 1951, inclusive, paid manufacturer's excise taxes in the sum of \$98,747.04 to the Commissioner of Internal Revenue who had assessed this said sum on plaintiff's returns during the periods involved herein.

IV.

On or about December 31, 1951, plaintiff duly filed with the Collector Robert A. Riddell at Los Angeles, California, a duly executed claim for refund in the amount of \$98,747.04, on August 5, 1952, said claim for refund was disallowed in full by the Commissioner of Internal Revenue. Plaintiff obtained written consents from ultimate purchasers to an allowance of such refunds in the amount of \$38,284.84. Of this amount, \$8,501.78 was paid to Collector, Harry C. Westover, during the months of November, 1947 to October 31, 1949, inclusive.

V.

Plaintiff is the manufacturer of three types of license plate frames. One type is for dealers advertising the dealer's name and products; the second has the name of the city or state; and the third is plain. Plaintiff only seeks a refund for taxes paid relative to the first type of frame, namely, the one that has the dealer's name upon it.

VI.

The automobile dealers who purchased license plate frames for advertising with their names upon them were the ultimate consumers and purchasers and did not charge their customers for the frames. The cost to the automobile dealers was reflected as an "advertising [22] expense" or "other expense" on their books and records.

VII.

The tax imposed is on the manufacturer's sale price of the manufactured article and whether the ultimate purchaser sells them or gives them away has no bearing on the tax liability of the manufacturer.

VIII.

The license plate frames in dispute are primarily adapted for use on motor vehicles. They are constructed to be affixed to automobiles by bolts, add to the utility, and become a component part of the automobile as well as an ornament. They also protect the license plate from the elements and prevent vibration.

IX.

The license plate frames which have the name of a state or city or which are plain can be purchased at any automobile accessory store. This indicates Exhibits 1-b and 1-c classification by the trade.

X.

A license plate frame remains a license plate frame whether it bears an advertisement or not.

XI.

The license plate frame with the dealer's name upon it is merely a frame with advertising molded into it, and is, and remains an automobile accessory under Section 3403(c) of the Internal Revenue Code of 1939.

Conclusions of Law

I.

The license plate frames with the dealers' names upon them are automobile accessories under Section 3403(c) of the Internal Revenue Code of 1939 and the Government was correct in collecting and in refusing to refund the excise tax attributable to their [23] manufacture and sale by plaintiff manufacturer.

II.

Plaintiff has failed to prove that defendant illegally collected from plaintiff and now owes plaintiff the sum of \$8,501.78 or any sum whatever.

III.

Defendant is entitled to judgment that plaintiff

take nothing, that the action be dismissed with prejudice and that it receive its costs.

Dated: This 24 day of October, 1955.

/s/ BEN HARRISON,

United States District Judge [24]

Affidavit of Service by Mail attached. [25]

[Endorsed]: Lodged October 11, 1955. Filed October 24, 1955.

[Title of District Court and Causes Nos. 16905-6.]

OBJECTIONS TO DEFENDANT'S PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

Plaintiff objects to the proposed Findings of Fact and Conclusions of Law submitted by the defendant in the above proceedings in the following particulars:

1. Amend Finding No. 5 by adding to the first clause of the second sentence, line 24, page 2, the words, "and products".

2. Finding No. 7 is objected to on the ground that it is a conclusion of law, argumentative, and not responsive to any material issue raised by the pleadings. [26]

3. Finding No. 8 is objected to on the ground that it does not conform to the agreed stipulation of facts, but is inconsistent and in conflict therewith; that there is no evidence in the record that the

license plate frames advertising the automobile dealer's business, wares, and products are:

“* * * constructed to be affixed to the automobile by bolts add to the utility, and become a component part of the automobile as well as an ornament; They also protect the license plate from the elements and prevent vibration.”

The alleged finding of fact quoted above represents conclusions of law, and, further, are based on alleged facts that are incompetent, irrelevant and immaterial to any issue in this proceeding. See Preface to Stipulation of Facts and page 8 of Plaintiff's Brief.

It will be noted that Plaintiff reserved the right in the agreed stipulation of facts to object to the materiality, relevancy, or competency of any matters set forth therein. Exhibits 1-b, and 1-c referred to in Paragraph 5 and Paragraph 8, and all of Paragraph 8, were objected to at the hearing, and in Plaintiff's Brief, and is now objected to on the ground that the sale of those items by Pep Boys and other firms, can have no conceivable relation to the issue in these proceedings. Plaintiff's claim for refund is based entirely on Exhibit 1-a (Automobile License Plate Frames) which advertise the dealer's name, business, wares, and products. Exhibit 1-b and 1-c do not pertain to Plaintiff's business in any way. The Court has not specifically ruled on Plaintiff's objection to the alleged evidence contained in Paragraph 5 and Paragraph 8 of the agreed stipulation of facts. Plaintiff respectfully requests the Court to specifically rule on said objection prior to

approving the findings of fact and conclusions of law herein.

4. Finding No. 9 is objected to on the ground that it is indefinite, uncertain, and ambiguous, and has no relevancy to any issue in the case. It is not clear whether such finding refers to Exhibits 1-a, 1-b, and 1-c or just to Exhibits 1-b and 1-c. Moreover, the last two sentences in the proposed finding are conclusions of law. [27]

5. Finding No. 10 is objected to on the ground that it is not responsive to any material issues in these proceedings, is not a finding of an ultimate fact, but in the nature of a conclusion of law.

6. Finding No. 11 is objected to on the ground that in its present form, it is a pure conclusion of law and does not conform to the agreed stipulation of facts, but is inconsistent therewith. The agreed facts show that the license frames (Exhibit 1-a) advertising the dealer's name, wares and products are specifically made for such dealer, and that his name and products are molded into the license frames.

7. Findings No. 7 to 11, inclusive, are objected to on the further ground that the alleged finding of fact and conclusions of law are intermingled and not separately stated as required by the Court's rules.

8. Amend Conclusions of Law, Paragraph 1, line 29, page 3, to line 1, page 4, inclusive, to read as follows:

"The license plate frames advertising the automobile dealer's name and products are automobile

accessories under Section 3403(c) of the Internal Revenue Code of 1939, and the Government was correct in collecting and refusing to refund the excise tax attributable to their manufacture and sale by plaintiff manufacturer.”

Dated this 14th day of October, 1955.

Respectfully submitted,

RILEY and HALL,
/s/ By B. H. NEBLETT,
Attorneys for Plaintiff [28]

[Endorsed]: Filed October 24, 1955.

[Title of District Court and Causes Nos. 16905-6.]

ORDER OVERRULING PLAINTIFF'S OB-
JECTION TO CERTAIN EVIDENCE RE-
CEIVED AT THE HEARING

It is by the Court

Ordered, that Plaintiff's objections to the materiality, relevancy, or competency of Exhibits 1-b and 1-c referred to in paragraph 5 and paragraph 8, and the remaining statements in paragraph 8, of the Agreed Stipulation of Facts are hereby overruled.

Dated October 24, 1955.

/s/ BEN HARRISON,
United States District Judge [30]

[Endorsed]: Filed October 25, 1955.

In the United States District Court for the Southern District of California, Central Division

No. 16905-BH

BENMATT ORGANIZATION, INC.,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

JUDGMENT

The above-entitled cause came on regularly for trial on the 12th day of September, 1955, before the Honorable Ben Harrison, sitting without a jury; plaintiff appearing by its attorneys Riley and Hall, by B. H. Neblett and William Huston, Esquires, and the defendant appearing by its attorneys Laughlin E. Waters, United States Attorney for the Southern District of California, Edward R. McHale, Assistant United States Attorney, Chief, Tax Division, and Bruce I. Hochman, Assistant United States Attorney; and evidence both oral and documentary having been received and the Court having considered the same and having made and duly entered its Findings of Fact and Conclusions of Law herein;

Now, Therefore, It is Hereby Ordered, Adjudged and Decreed that the plaintiff take nothing in the above-entitled action and that defendant have judgment for and shall recover from plaintiff the

amount of defendant's costs to be taxed by the Clerk of this Court in the sum of \$20.00. [31]

Judgment rendered this 24 day of October, 1955.

/s/ BEN HARRISON,

United States District Judge [32]

[Endorsed]: Lodged October 11, 1955. Filed October 24, 1955.

[Title of District Court and Cause No. 16905.]

NOTICE OF APPEAL

Notice is hereby given that Benmatt Organization, Inc., plaintiff, above named, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the final judgment entered in this action on October 25, 1955.

Dated: December 13, 1955.

RILEY and HALL,

/s/ By B. H. NEBLETT,

Attorneys for Plaintiff [33]

[Endorsed]: Filed December 16, 1955.

[Title of District Court and Cause No. 16905.]

UNDERTAKING FOR COSTS ON APPEAL

Whereas, the Plaintiff in the above-entitled action is about to appeal to the United States Court of Appeals, Ninth Circuit, from a judgment entered

against it in said action, in said United States District Court, in favor of the Defendant in said action, on the 25th day of October, 1955.

Now, Therefore, in consideration of the premises, and of such appeal, the undersigned The Ohio Casualty Insurance Company, a corporation duly organized and existing under the laws of the State of Ohio, and duly authorized to transact a general surety business in the State of California, does undertake and promise on the part of the appellant that the said appellant will pay all costs which may be awarded against the Plaintiff on the appeal, or on a dismissal thereof, not exceeding Two Hundred Fifty and No/100 (\$250.00) Dollars, to which amount it acknowledged itself bound.

In Witness Whereof, the corporate seal and name of the said Surety Company is hereto affixed and attested at Los Angeles, California, by its Attorney-in-Fact, this 13th day of December, 1955.

[Seal] THE OHIO CASUALTY INSUR-
 ANCE COMPANY,

/s/ By CHARLOTTE H. BARR,
 Attorney-in-Fact

[35]

Affidavit of Attorney-in-Fact for Surety attached.

[Endorsed]: Filed December 16, 1955.

Title of District Court and Causes Nos. 16905-6.]

STATEMENT OF POINTS

The points upon which Appellant intends to rely in this Appeal are as follows:

1. The Court erred in holding that Plaintiff is manufacturer of automobile parts or accessories within the meaning of Section 3403(c) of the 1939 Code and Treasury Regulation 46 (1941 Edition, Section 316.55).

2. The Court erred in holding that the license plate frames, designed to advertise the automobile dealer's business wares and products are automobile accessories within the meaning of Section 3403(c) of the 1939 Code, Treasury Regulation 46 (1941 Edition, Section 316.55). [36]

3. The Court erred in refusing to hold that the license plate frames were specifically made for individual automobile dealers with the name of dealer's business and products molded into them, represented the sale of labor and material and were not the sale of such frames as "automobile accessories".

4. The Court erred in overruling Plaintiff's objection to the materiality, relevancy or competency to any issue herein of Exhibits 1-b and 1-c referred to in paragraph 5 and paragraph 8 and the remaining statements contained in (a), (b) and (c) of paragraph 8 of the Stipulation of Facts.

Dated: This 11th day of January, 1956.

RILEY and HALL,

/s/ By B. H. NEBLETT,

Attorneys for Plaintiff

[37]

Affidavit of Service by Mail attached.

[38]

[Endorsed]: Filed January 12, 1956.

[Title of District Court and Causes Nos. 16905-6.]

DESIGNATION OF CONTENTS OF RECORD ON APPEAL

Appellant, Benmatt Organization, Inc., designates the following portions of the record, proceedings and evidence to be contained in the record on appeal in this action:

1. The Complaint.
2. Defendant's Answer to the Complaint.
3. Stipulation of Facts, including Exhibits 1-a, 1-b and 1-c referred to therein.
4. Opinion.
5. Findings of Fact and Conclusions of Law.
6. Objections to Defendant's proposed Findings of Fact and Conclusions of Law.
7. Order Overruling Plaintiff's Objections to certain evidence received at the Hearing.
8. Judgment, entered October 25, 1955.
9. Notice of Appeal, filed December 13, 1955.
10. Bond for Cost on Appeal.

11. Statement of Points on which Appellant intends to rely, served herewith.

12. This Designation.

Dated: This 11th day of January, 1956.

RILEY and HALL,

/s/ By B. H. NEBLETT,

Attorneys for Plaintiff [40]

Affidavit of Service by Mail attached. [41]

[Endorsed]: Filed January 12, 1956.

[Title of District Court and Cause No. 16905.]

CERTIFICATE OF CLERK

I, John A. Childress, Clerk of the United States District Court for the Southern District of California, do hereby certify that the foregoing pages numbered 1 to 41, inclusive, contain the original

Complaint;

Answer;

Stipulation of Facts; (16905-BH—16906-BH)

Opinion; (16905-BH—16906-BH)

Findings of Fact and Conclusions of Law;
(16905-BH—16906-BH)

Objections to Defendant's Proposed Findings of Fact and Conclusions of Law; (16905-BH—16906-BH)

Order Overruling Plaintiff's Objection to Certain Evidence Received at the Hearing; (16905-BH—16906-BH)

Judgment;

Notice of Appeal;

Statement of Points; (16905-BH—16906-BH)

Designation of Contents of Record; (16905-BH—16906-BH which, together with a photostatic copy of Undertaking for Costs on Appeal and Plaintiff's exhibits 1-a, 1-b, 1-c, in the above-entitled cause, constitute the transcript of record on appeal to the United States Court of Appeals for the Ninth Circuit, in said cause.

I further certify that my fees for preparing the foregoing record amount to \$2.00, the sum of which has been paid by appellant.

Witness my hand and the seal of said District Court, this 24th day of January, 1956.

[Seal] JOHN A. CHILDRESS,
Clerk

/s/ By CHARLES E. JONES,
Deputy

[Endorsed]: No. 15007. United States Court of Appeals for the Ninth Circuit. Benmatt Organization, Inc., Appellant, vs. United States of America, Appellee. Transcript of Record. Appeal from the United States District Court for the Southern District of California, Central Division.

Filed: January 25, 1956.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for
the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

Civil No. 15007

BENMATT ORGANIZATION, INC.,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

Civil No. 15008

BENMATT ORGANIZATION, INC.,
Appellant,

vs.

ROBERT A. RIDDELL, Director of Internal
Revenue, Appellee.

ADOPTION OF DESIGNATION OF RECORD
AND STATEMENT OF POINTS

Appellant, Benmatt Organization, Inc., hereby
adopts the Designation of Contents of Record on
Appeal and Statement of Points appearing in the
certified typewritten transcript of the record herein
in the same manner and to the same extent as
though herein fully set out.

RILEY and HALL,
/s/ By B. H. NEBLETT,
Attorneys for Appellant

Affidavit of Service by Mail attached.

[Endorsed]: Filed Feb. 8, 1956. Paul P. O'Brien,
Clerk.



No. 15007

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

BENMATT ORGANIZATION, INC.,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Appeal From the United States District Court for the
Southern District of California.

BRIEF FOR THE APPELLANT.

RILEY & HALL and

B. H. NEBLETT,

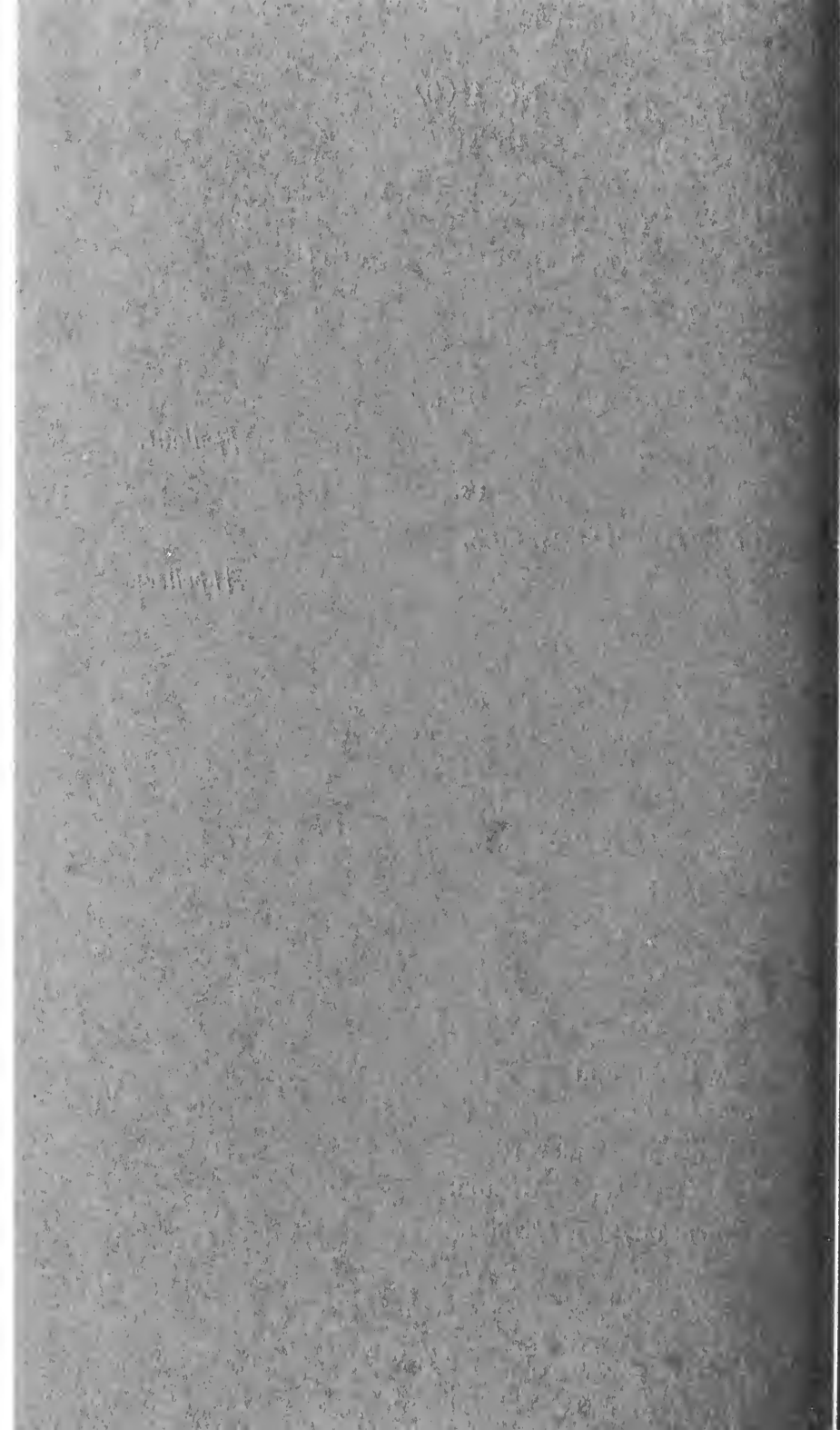
900 Wilshire Boulevard,
Los Angeles 17, California,

Attorneys for Appellant.

FILED

MAY - 9 1956

PAUL P. O'BRIEN, CLERK



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No. 15007

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

BENMATT ORGANIZATION, INC.,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Appeal From the United States District Court for the
Southern District of California.

BRIEF FOR THE APPELLANT.

Opinion Below.

The finding of fact and opinion of the District Court are reported in the record at pages 17 to 26. The opinion may also be found in 134 Fed. Supp. 511.

Jurisdiction.

This proceeding involves manufacturer's excise tax from November 1, 1947 through October 31, 1949, in the sum of \$8,501.78, together with interest as provided by by law.¹ The taxpayer filed a complaint with the District

¹This is a companion case. The parties stipulated that Civil No. 15008, involving same issues, abide final judgment herein.

Court on July 7, 1954 [R. 1] under the provisions of Sections 1340 and 1346(a)(1) of 28 U. S. C. The judgment of the District Court was entered October 24, 1955 [R. 30-31]. Notice of appeal was filed on December 16, 1955 [R. 31].

Questions Presented.

I.

Whether license plate frames [Ex. 1-a], specifically designed and manufactured to advertise an automobile dealers' business and products, with the name of the dealers' business and products molded into them, are "automobile accessories," within the meaning of Section 3403 (c) of the 1939 Code and Section 316.55 of Treasury Regulation 46.

II.

Whether license plate frames [Exs. 1-b and 1-c], bearing the name of a city, state or plain, are "automobile accessories," within the meaning of Section 3403(c), of the 1939 Code and Section 316.55 of Treasury Regulation 46.

III.

Whether license plate frames [Ex. 1-a], specifically designed and manufactured to advertise an automobile dealer's business and products, with the name of the dealers business and products molded into them, represent the sale of labor and material, or the sale of such frames as "automobile accessories" within the meaning of Section 3403(c), of the 1939 Code and Section 316.55 of Treasury Regulation 46.

IV.

Whether license plate frames [Exs. 1-b and 1-c], bearing the name of a city, state or plain, not sued on in this proceeding, and the facts contained in Paragraph VIII of the stipulated facts were properly received in evidence.

V.

Whether the provisions of a statute levying taxes, in case of doubt, are to be construed in favor of the taxpayers or most strongly against the government.

Statutes and Regulations Involved.

The applicable statutes and Regulations are set forth in the Appendix.

Statement.

The taxpayer is the manufacturer of automobile license plate frames [Exs. 1-a, 1-b and 1-c]. Exhibit 1-a, is specifically designed and manufactured for automobile dealers, with the name and products of the dealer molded into them [R. 25, Par. XI]. Such frames are given to customers for "advertising" purposes and charged to "advertising or other expense" on the dealers' books and records [R. 24, Par. VI]. License plate frames, advertising the dealers' business, cannot be purchased from automobile supply stores. Exhibits 1-b and 1-c, received in evidence over plaintiff's objection, bearing the name of a city, a state or plain, can be purchased at automobile supply stores and are advertised by such stores as protecting and complimenting license plates [R. 25, par. XI].

Appellant did not file claims for refund with respect to the manufacturers' excise tax represented by Exhibits 1-b and 1-c, and those taxes are not involved in this proceeding. The reason is as follows: Exhibits 1-b and 1-c

are sold over the counter by automobile supply stores and the purchaser is the ultimate consumer [R. 25]. Plaintiff had no way of knowing who the ultimate consumer was, so as to secure the written consents, required by Section 3443(d) of the 1939 Code (now Section 6416 of the 1954 Code).

Summary of Argument.

License plate frames [Ex. 1-a] advertising the dealers' business are not included in the generic term "automobile accessories," within the meaning of statute and the Regulations; that such frames are specially designed and made to order for automobile dealers; that the dealer's name is molded into them; that they advertise and identify the dealer's business and products; that advertising is their principal and primary function; that such frames are "accessory" to the dealers' business and not the automobile and are "commonly and commercially" known as advertising devices; that such frames cannot be obtained from automobile supply stores, but only from auto dealers and the customer is not charged for them; that the cost of such frames are charged to "advertising or other expense" on the dealers' books and records; that such frames do not come within the statutory classification of "automobile accessories," either by name or descriptive phrase; that the question is essentially one of classification; that license plate frames are advertising devices; and that such frames cannot be identified as the thing or article Sections 3403(c) and 316.55 of Treasury Regulation 46 have taxed and do not fit into such classification.

License plate frames [Ex. 1-b and 1-e], bearing the name of a city or state or plain, are not "automobile accessories" within the meaning of the statute and the Regu-

tions; and that license plate frames, with or without advertising matter, are unrelated and extraneous to the operational and functional elements of an automobile, and therefore such frames are not "automobile accessories."

License plate frames, advertising the dealers' business and specifically made to order for the various dealers, *represent the sale of labor and material*, and not the sale of frames as "automobile accessories" within the meaning of Section 3403(c) and Section 316.55 of Regulation 46.

The District Court, over plaintiff's objection, improperly received in evidence Exhibits 1-b and 1-c and other evidence contained in Paragraph VIII of the stipulated facts that Auto Supply stores advertised and sold such frames as articles for the protection and adornment of automobile plates; that plaintiff did not file claims for refund for the excise taxes, represented by Exhibits 1-b and 1-c, and those taxes are not involved in this proceeding; that, therefore, Exhibits 1-b and 1-c and the other evidence mentioned above are incompetent, irrelevant, and immaterial to any issue in this proceeding. Plaintiff reserved the right to object to materiality and competency of the above evidence in the written stipulation of facts signed by the parties [R. 14, 29]. The District Court entered an order over-ruling appellant's objections on October 24, 1955 [R. 29].

The provisions of a statute levying taxes, in case of doubt, are to be construed, in favor of the taxpayer; and most strongly against the government.

ARGUMENT.

I.

License Plate Frames [Ex. 1-a] Advertising the Dealers' Business, Are Not "Automobile Accessories."

II.

License Plate Frames [Exs. 1-b and 1-c] Bearing the Name of a City or State or Plain Are Not "Automobile Accessories."

Points I and II will be discussed together for the sake of convenience. Plaintiff's purpose under these headings is twofold: to endeavor to persuade this Court that license plate frames, advertising the automobile dealers' business, are not "accessories" and at the same time to persuade the Court that license plate frames, without advertising matter are not "accessories." If license plate frames, without advertising matter, are not "accessories" because unrelated to the automobile's "utility," *a fortiori*, license plate frames, advertising the dealer's business, are not "accessories." However, the converse of this proposition does not follow as will be hereinafter pointed out. Appellant maintains that the license plate frames herein, with or without advertising matter, are not included in the generic term "automobile accessories."

The question is essentially one of classification and the test, is whether the article attempted to be taxed, can be identified, by name or descriptive phrase, as the article the statute has taxed. Considerable light is thrown upon the problem by a close study of the statute and the Regulation. Section 3403 (c) of the 1939 Code, enumerates by name six "articles" "which shall be considered parts or accessories" and which are "spark plugs, storage batteries, leaf-springs, coils, timers, and tire chains." These six

“articles” were deliberately placed in the statute as a guide and to aid in defining the generic term “automobile accessories” and constitute statutory examples or classification. Each named article serves an operational and functional need of an automobile. License plate frames, on the contrary, are not a necessary and component part of an automobile and serve no operational nor functional need, therefore, such frames are functionally unrelated and extraneous to the *six named articles* set out in the statute. This being the case, license plate frames cannot be identified as the “articles” the law has attempted to tax. Such frames, in short, are not comprehended by and responsive to the statutory classification. Significantly, Treasury Regulation 46, Section 316.55 pick up and repeat *the same six named* “articles” listed in Section 3403(c) of the statute, thereby emphasizing and adopting the examples and classification set out in the statute.

The District Court’s opinion states that “the evidence in this case discloses that automobile license plate frames can be purchased at any automobile accessory store, *which in itself, indicates that classification by the trade.*” The Court has inadvertently misread the stipulation of facts. The stipulated facts show that only license plate frames [Ex. 1-b] bearing the name of a city or state, and Exhibit 1-c which is plain, can be purchased at automobile supply stores. Exhibit 1-a, sued on in this proceeding, advertising the dealer’s business and products, cannot be purchased at automobile supply stores, and can only be obtained from automobile dealers. The error apparently caused the Court to incorrectly classify Exhibit 1-a, advertising the dealer’s business, as “automobile accessories.” This is borne out by the Court’s statement above quoted, “*which in itself, indicates that classification by the trade.*” Under the District Court’s reasoning, the fact that *Exhibit*

1-a, advertising the dealer's business, is not sold by auto supply stores indicates that such frames *are not classified by the trade* as "automobile accessories" and are, therefore, not "automobile accessories" within the meaning of the act. If license plate frames, advertising the dealer's business, under the Court's theory, were so classified *by the trade*, they would be included in the stocks of the automobile supply stores, and sold to customers in the normal course of their business. Exhibit 1-a, advertising the dealer's business, is manufactured and sold to automobile dealers only, and not to the general public. This fact, based on the District Court's theory, stamps them as advertising devices and indicates quite clearly their classification in the trade as advertising devices or media.

The opinion below further states "the plaintiff has recognized that frames without the advertising matter inserted on the body of the frames are subject to the tax by paying the same and not seeking a refund." We respectfully disagree with this conclusion by the Court. The reason for not suing on the frames [Exs. 1-b and 1-c] without the advertising matter, adverted to hereinabove, was because of the plaintiff's inability to secure the written consent of the ultimate consumer as required by Section 3443(d) of the 1939 Code. Exhibits 1-b and 1-c are sold over the counter by the automobile supply stores and the purchaser is the ultimate consumer. The taxpayer had no way of knowing who the customer was so as to secure the written consent required by the statute. In the case of the license plate frames, Exhibit 1-a, advertising the automobile dealer's business, the dealer is the ultimate purchaser since he gives the frames to his customers. As a prerequisite to bringing this proceeding, the automobile dealers' written consents were secured [R. 7, Par. 10]. Exhibit A, attached to the complaint [R. 8],

shows that the taxpayer overpaid the tax by \$98,747.04, yet written consents were obtained for only \$38,205.64. As a practical matter, it was difficult to secure the written consents even from the automobile dealers. Actually, the task was impossible with respect to Exhibits 1-b and 1-c, because the ultimate consumer was unknown to the plaintiff.

The Court below cited *Masterbilt Products Corp. v. U. S. A.* (1942), 42 Fed. Supp. 294, in support of its view that license plate frames are "accessories." The taxpayer designed and sold automatic cigarette lighters and dispensers. The device when attached to an automobile enabled a smoker who was driving to obtain a lighted cigarette without taking his eyes off the road, thereby contributing to safe driving, but not essential to safe driving. The contrivance was advertised by the plaintiff as an automobile safety device, which, in fact, it was and substantially contributed to the "utility and use" of the automobile. The Court stated it contributed to safe driving because "it enabled the operator of a car to obtain a lighted cigarette without taking his eyes from the road"; thus, it appears that automatic cigarette lighters are safety devices that contribute to the functional needs and utility of an automobile, and thus may be readily distinguished from the license plate frames in the present case. In *Masterbilt Products Corp., supra*, the Court cited *Universal Battery Co. v. United States* (1953), 281 U. S. 580, 584, 50 S. Ct. 422, 423, 74 L. Ed. 1051, and quoted the *rule* from that case as follows:

"It is that articles primarily adapted for use in motor vehicles are to be regarded as parts or accessories of such vehicles even though there has been some other use of the articles for which they are not so well adapted."

We maintain that the use of the phrase "primarily adapted" refers to some utility or functional need for the device on the automobile. In *Universal Battery Co. v. U. S.*, *supra*, from which the above quotation was adopted, *the articles involved were storage batteries, gascolaters, parts to speedometers, and brackets and fittings for use as replacement parts for bumpers on automobiles.* Each article, above named, is basically integrated to the operational and functional needs of an automobile and to its utility. Each article is within the classification and class of articles, comprehended by Section 3403(c) and, therefore, clearly within the generic term "automobile accessory." An automobile operates just as well without license frames, so, obviously, such frames do not add to the machine's utility. The test, therefore, set out in the *Universal Battery Co.* case has not been met. (*White v. Aronson* (1937), 302 U. S. 16, 82 L. Ed. 20, 58 St. Ct. 97.) The rule of the *Universal Battery* case, must be construed in relation to its facts. When so construed, the language used, refers to articles that are functionally related to the machine's utility.

The Court below cited *Cuno Engineering Corp. v. United States* (1930), 43 F. 2d 259, in support of the view that each case depends upon the particular facts under consideration. We fully agree with this statement of the law by the District Court. However, it is interesting to note that the *Cuno* case, *supra*, involved the sale of electric cigar lighters, combination cigar lighters, and ash receivers, and the Court held that such articles were not "automobile accessories" subject to the manufacturer's excise tax act. At page 262, 263, the Court stated:

"(1, 2) The installation of a cigar lighter and ash receiver is manifestly a convenience to smokers occupying an automobile. *It may or may not add to*

the ornamentation of a car. This is a matter of taste. The defendant asserts that 'Congress meant to tax articles used on or in connection with automobiles.' If so, the taxing statute has not been so construed by the Commissioner or the courts. Auburn Rubber Co. v. United States, 67 Ct. Cl. 49; Wells Mfg. Co. v. United States, 66 Ct. Cl. 283; Milwaukee Motor Products Co. v. United States, 66 Ct. Cl. 295. The Commissioner has not taxed flower holders, ash receivers, cardcases, toilet cases, vanity cases, baby cribs, or hammocks. Obviously a clear distinction prevails, and was within the intent of the Revenue Act, between an extraneous article or device capable and designed for use as a matter of comfort or luxury to occupants of an automobile, and one so intimately connected with its safe operation and functioning elements that it becomes a component part of the machine's utility. The segregation essential to make depends upon the facts of each case. We have held so more than once. Edison Storage Battery Company v. U. S., 67 Ct. Cl. 543, decided May 6, 1929; Cracker Jack Co. v. U. S. 67 Ct. Cl. 89, decided February 4, 1929. Aside from the general commercial value of the devices here involved, it is difficult to see how they in any wise prolong the life of a car, aid in its operation, or function to overcome any of the various difficulties attendant upon the car's operation, or the incidental inconveniences of automotive travel. A box of safety or loose matches, a separate automatic cigar lighter and ash receiver, clearly constitute a substitute for the devices involved. The electric lighter takes the place of all these, and does no more than serve a personal convenience to the occupant of the car who desires and seeks its use. We think the devices are to be classified alongside flower holders, cardcases, etc., heretofore mentioned." (Emphasis supplied.)

It will be noted that the Court observed

“obviously a clear distinction prevails and was within the intent of the Revenue Act, between an extraneous article or device capable and designed for use as a matter of comfort or luxury to occupants of an automobile, and one so intimately connected with its safe operation and functioning elements that it becomes a component part of the machine’s utility.”

Manifestly, license plate frames advertising the dealer’s business and products or plain frames, are not so intimately connected with the operation of the automobile’s functioning elements that it becomes a component part of the machine’s “utility.” Moreover, it is difficult to see how license plate frames “in anywise prolonged the life of a car, aid in its operation or function to overcome any of the various difficulties attendant upon the car’s operation, or the incidental inconvenience of automotive travel, so as to be classified as “automobile accessories.”

The Court below further stated “It is my view that the use of frames is so widely known that the Court can take judicial notice of *their utility and use, as well as their ornamentation* (Cadwalder v. Zeh (1894), 151 U. S. 171, 14 S. Ct. 288, 38 L. Ed. 115)” (Emphasis supplied). By the above statement and the use of the word “utility”, the Court below properly recognizes that an article to be an “automobile accessory” must contribute to the operational and functional need of an automobile and must be a component part of the machine’s “utility”, which is precisely the appellant’s position herein. The Court further states, it will take judicial notice that license plate frames have such “utility and use” on automobiles and cites *Cadwalder, supra*, in support of this view. We

respectfully submit that the *Cadwalder* case, *supra*, does not support the view that the Court can take judicial notice of the "utility and use as well as their ornamentation" of license plate frames on automobiles. The case involved the interpretation of the tariff act, and holds that, in the construction of the act, words used therein to designate particular kinds or class of goods (toys), the commercial meaning is to prevail, unless Congress has "clearly manifested a contrary intention", and that it is only when no commercial meaning is called for or proved that the common meaning of the word is to be adopted.

We have contended all along that license plate frames are extraneous to the operational and functional needs of an automobile. If the District Court may take judicial notice of "the utility and use" of the license plate frames on automobiles, this Court may take judicial notice of the fact that thousands of automobiles do not use or employ license plate frames. This factor alone clearly indicates the non-essential and extraneous character of license plate frames on cars, from the standpoint of "utility and use". Further, the evidence shows that license plate frames advertising the automobile dealer's business and products are "commercially known" as advertising devices. The frames are not sold to the general public in automobile supply stores, but the dealer gives such frames to their customers and charge the cost on their books as "*advertising or other expense*". Thus, under *Cadwalder v. Zeh*, *supra*, automobile license plate frames, advertising the dealer's name and business, are commercially known in the trade as advertising devices. It is self-evident from the frames themselves that they are advertising devices and automobile dealers and the general public regard them as advertising devices. The general public knows that the only place such frames can be obtained is from an

automobile dealer. Frames, advertising the dealers' business are not handled by automobile supply stores.

The District Court further states, "To put the same more clearly, plaintiff contends that an accessory ceases to be an accessory when an advertising plate is affixed thereto." The Court erroneously assumes that appellant concedes that license plate frames [Exs. 1-b and 1-c], bearing the name of city or state or plain, are automobile accessories. Appellant does not so concede. In the case of Exhibits 1-b and 1-c, as above stated, we could not locate the ultimate consumer, which accounts for the fact that we did not file a claim for refund with respect to the articles represented by those exhibits. As pointed out above, appellant maintains that the plain frames have no operational or functional use on an automobile and, therefore, may not be classified as an "automobile accessory."

The District Court believes that an accessory does not cease to be an accessory because it bears advertising matter, and states: "Hub-caps would be exempt under the same theory." We respectfully submit, with all deference, to the District Court, that hub-caps are a necessary and, component part of an automobile and add to its utility. They keep the dirt and grime out of the axles, contribute to the safety of operation, and prolong the life of the car. The Court further illustrates its views by the statement "A package of matches continues to be a package of matches notwithstanding the package carries an advertisement" and "a license plate frame is a license plate frame whether it bears an advertisement or is plain. A rose by another name does not cease to be a rose." These quotations from the District Court's opinion are not believed pertinent to the situation herein and seems to have

resulted from the Court's erroneous assumption that the plaintiff conceded that *plain license frames* are "automobile accessories." Assuming *arguendo*, that license plate frames without the advertising matter, are "accessories", it does not follow that license plate frames, advertising the dealer's business and name, are, therefore, "automobile accessories." The addition of the advertising matter, under the circumstances herein, assuming the plain frames are "automobile accessories," qualifies and changes the character of such frames as "automobile accessories", and classifies them as advertising media or devices.

An analogous situation is found in the income tax law. For example, the Commissioner of Internal Revenue *allows a deduction* for the cost and maintenance of uniforms of: baseball players, bus drivers, firemen (city), jockeys, letter-carriers, surgeons, nurses, etc. Ordinarily, clothing represents non-deductible personal expenses. However, owing to the character of the uniforms and the use to which they are put, the Commissioner allows and the Courts have approved a deduction for cost and maintenance. (1956—C. C. H., Par. 1342.2646). The license plate frames, advertising the dealer's business, like the uniforms are in a different category and classification and are, therefore, not subject to the manufacturers excise tax.

The license plate frames, advertising the automobile dealer's business are given to their customers. The District Court states "whether the dealer-purchaser gives them to his customer or sells them is immaterial to any issue in this case." *Williams v. Harrison* (1940), 110 F. 2d 989, is cited in support of this view. This pronouncement does not seem to be sound when applied to the factual situation in the subject case. It is our position

that the license frames advertising the automobile dealer's business are purely advertising devices and are commercially known as such in the trade. The fact that such frames are given to customers and the cost charged as "advertising or other expense," is pertinent evidence in support of this theory and argument.

Appellant's position herein, that license plate frames, advertising the automobile dealer's business, are not "accessories," is supported by *Smith v. McDonald* (C. A. 3, 1954), 214 F. 2d 920, reversing 116 Fed. Supp. 158. Certiorari was not applied for. Briefly, the facts in the *McDonald* case, *supra*, may be summarized as follows: The plaintiff trading as Night-Lite Sign Co., manufactured an electric sign designed to be attached by suction cups to the tops of taxicabs to advertise the taxicab operators' business. The sign consisted of a lucite tube housing, lettered "taxi," "vacant," "yellow," "veteran," or as otherwise desired. The signs are illuminated by electrical bulbs in the lucite housing. Such signs were purchased only by taxicab operators.

Justice Kalodner wrote the opinion. He stated the legal question in the first sentence of his opinion as follows:

"Is an electrical sign, designed to be attached to the top of taxicabs to advertise its wares, an automobile accessory within the meaning of Section 3403(c) of the Internal Revenue Code which imposes a 5% tax on automobile accessories?"

This is the precise question involved in the present case, that is, whether license plate frames advertising the automobile dealers' business are "accessories" within the meaning of Section 3403(c), Internal Revenue Code, and Section 316.55 of Treasury Regulation 46. The simi-

arity between the cases is patent from a statement of the questions. The applicable statute and regulations are set out in a footnote in the *McDonald* case. The same statute and regulations are involved in the present case.

In *McDonald, supra*, the court stated "Upon consideration of the issues, we are of the opinion that plaintiff's electrical signs are not accessories. The character and use of the signs on taxicabs is analogous to the character and use of taximeters on taxicabs." It will be noted that the Third Circuit precisely held that electric signs on taxicabs "are not accessories." The District Court, in the present case, commented on the *McDonald* case, *supra*, and stated "With this holding we have no quarrel, but fail to see its application to this case." It seems clear to us that the *McDonald* case is based upon the premise and precisely holds that electric signs on taxicabs are not 'accessories.' The fact that they are *analogous* to the character and use of taxicab meters on taxicabs is not important. The basic thing is that the Court found and held in *McDonald supra*, that the taxicab signs were not "accessories" within the meaning of Section 3403(c) and Section 316.55 of Treasury Regulation 46.

In *Smith v. McDonald, supra*, Justice Kalodner not only stated the question but further clarified the issue to be decided by clearly stating the contentions of the parties. We quote:

"The sum of plaintiff's contention on this appeal is that 'advertising sign or device' is not included in the generic term 'automobile accessory'; that 'that which is an accessory is integrated in the thing to which it is accessory'; that his electric sign is *accessory* to the taxicab operator's *business and not to his cab*.

“It is the Collector’s position that Section 316.55 of Treasury Regulation 46, which pertains to Section 3403(c), properly specifies that any article which is designed to be attached to an automobile to add to its utility or ornamentation, or whose primary use is in connection with an automobile, is an ‘accessory.’ The Regulation, says the Collector is dispositive of the plaintiff’s contention under *Universal Battery v. United States* (1930), 281 U. S. 580, 50 S. Ct. 422, 74 L. Ed. 1051.”

In *McDonald*, *supra*, the government thought, as they do here, that *Universal Battery* case was dispositive of the issue.

Finally, the Court stated in *Smith v. McDonald*, *supra*, “It may be observed that the Treasury Department has held that emblems designed to be attached to automobiles to show membership in automobile clubs, societies, etc. *are not taxable as automobile parts or accessories*, S. T. 409-11-1, C. B. 285.” (Emphasis supplied.) The Circuit Court’s reference, in *Smith v. McDonald*, *supra*, to “emblems designed to be attached to automobiles to show membership in automobile clubs, societies, etc.” sustains and confirms appellant’s view, that license plate frames, advertising the automobile dealer’s business are not “accessories”. The Court makes this point crystal clear, by comparing such emblems to the electric taxicab signs involved in the *McDonald* case. Actually, license plate frames, designed and manufactured to advertise an automobile dealer’s business, more nearly resemble “automobile emblems” than the “electric taxicab signs” in *McDonald*, *supra*.

Moreover, the license plate, itself, is not an “automobile accessory”. Logically, therefore, on what theory could the

license frame surrounding the license plate be regarded as an "accessory." License plate frames are not required on automobiles by the State of California or any other state. Assume the state furnished the license frame along with the plate, yet the combination would not make the license frame an "automobile accessory." The State of California requires a license plate for the purpose of identifying the automobile and its owner. License plate frames, advertising the dealer's business, are in the same category. They merely identify the dealer and advertise his business. Such frames, therefore, may not be classified as "automobile accessories."

III.

License Plate Frames Specifically Designed and Manufactured to Advertise the Automobile Dealer's Business and Products Represent the Sale of Labor and Material, and Are Not Sales of Frames as "Automobile Accessories."

Our position under this point is supported by *Johnnie and Mack, Inc.* (D. C. Fla., 1954), 123 Fed. Supp. 400 (appeal not taken). The plaintiff made seat covers to individual orders, after selection of the fabric by the purchasers. The purchasers were individual owners, and new and used car dealers. The Court held, in these circumstances, that the sale of seat covers *were the sales of labor and material* and were not the sales of seat covers as "accessories", within the meaning of Section 3403(c) and Section 316.55 of Treasury Regulation 46. The Court further stated that this was true whether the seat covers were made to individual automobile owners, after selection of fabrics by the purchaser, and irrespective of whether the purchaser is an individual automobile owner, or is a new or used car dealer. The license plate frame,

in the present case, advertising the dealer's business were made to order for the various automobile dealers. They, therefore, are analogous to the seat covers in *Johnnie and Mack, Inc., supra*, and represent the sale of labor and material and are not the sales of license plate frames as "accessories" within the meaning of Section 3403(c) and the regulations.

Another similar case is *Bacon & Van Buskirk Glass Co. v. Lackenbill* (D. C. Ill., 1955), 55-1, U. S. T. C. Par. 49-124. (The government did not appeal. C. C. H. 1956, Vol. 5, p. 51.102.) The taxpayer is engaged in the retail glass business, cutting glass from large sheets as ordered by customers for installation in their windshields, doors, or ventilator wings of their automobiles. Plaintiff did not, at any time, cut any glass for installation and place same in stock for resale to any person or persons but only as ordered by customers. The Court held that plaintiff was not a manufacturer of automobile parts or accessories within the meaning of the law, Section 3403(c), and the Regulations. The license plate frames in the present case, advertising the dealer's business, are cut from large metal sheets as *specially ordered by various automobile dealers*. Such frames are not carried in stock for sale to any person or persons. In this respect, the factual situation in the present case is similar to *Johnnie and Mack, Inc., supra*, and *Bacon & Van Buskirk Glass Co., supra*, and requires a similar holding. Asserting a contrary view, see *Masao Hirasuno v. McKenney* (D. C. Hawaii, 1955), 135 Fed. Supp. 897.

IV.

License Plate Frames [Exs. 1-b and 1-c] Bearing the Names of a City, State or Plain, and the Facts Contained in Paragraph VIII of the Stipulated Facts, Were Improperly Received in Evidence.

Appellant did not file claims for refund for the manufacturer's excise taxes, represented by Exhibits 1-b and 1-c, and those taxes are not involved in this proceeding. Consequently, Exhibits 1-b and 1-c, and the other facts contained in Paragraph VIII of the stipulated facts [R. 15], are incompetent, irrelevant and immaterial to any issue in this proceeding. Appellant reserved the right in the written stipulation of facts to object to such evidence on the ground that it was incompetent, irrelevant and immaterial [R. 14]. The District Court entered an order over-ruling appellant's objection to that evidence on October 24, 1955 [R. 27, 29]. Appellant points out that the District Court's finding of facts and conclusions of law and judgment herein was based on the above incompetent evidence [Pars. VIII, IX, X and XI of Find. of Facts; R. 24, 25]. In these circumstances, Paragraphs VIII, IX, X and XI of the District Court's findings of fact are invalid because they are not supported by competent and material evidence.

V.

The Provisions of a Statute Levying Taxes, in Case of Doubt, Must Be Construed in Favor of the Taxpayer and Most Strongly Against the Government.

Finally, appellant is convinced, that the license plate frames, herein, with or without advertising matter, do not come within the meaning of Section 3403(c) and Section 316.55 of Treasury Regulation 46, either by name, classi-

fication or descriptive phrase, *White v. Aronson, supra*. Such frames cannot be identified by reference to the statute and the Regulations as the thing or article the statute has attempted to tax. Obviously, there is doubt whether the license plate frames herein fall within the examples or classification set out in the Act. In case of doubt, the provisions of a statute must be construed in favor of the taxpayer and most strongly against the government. The lower Court contrary to this salutary rule, has erroneously enlarged the scope of Section 3403(c) and Section 316.55 of Treasury Regulation 46, instead of restricting the meaning of "Automobile accessories" to the articles identifiable under said Act. This important rule of statutory construction may not be lightly disregarded.

In *Gould v. Gould* (1917), 245 U. S. 151, 62 L. Ed. 211, 38 S. Ct. 53, the Court stated:

"In the interpretation of statutes levying taxes it is the established rule not to extend their provisions, by implication, beyond the clear import of the language used, or to enlarge their operations so as to embrace matters not specifically pointed out. *In case of doubt they are construed most strongly against the government, and in favor of the citizen. United States v. Wigglesworth*, 2 Story, 369, Fed. Cas. No. 16,690; *American Net & Twine Co. v. Worthington*, 141 U. S. 468, 474, 35 L. Ed. 821, 824, 12 Sup. Ct. Rep. 55; *Benziger v. United States*, 192 U. S. 38, 55, 48 L. Ed. 331, 338, 24 Sup. Ct. Rep. 189." (Emphasis supplied.)

In *U. S. v. Merriam* (1923), 263 U. S. 179, 68 L. Ed. 240, 44 S. Ct. 69, the Court stated:

"On behalf of the government it is urged that taxation is a practical matter, and concerns itself with the substance of the thing upon which the tax is

imposed, rather than with legal forms or expressions. *But in statutes levying taxes the literal meaning of the words employed is most important, for such statutes are not to be extended by implication beyond the clear import of the language used.* If the words are doubtful, the doubt must be resolved against the government in favor of the taxpayer. *Gould v. Gould*, 245 U. S. 151, 153, 62 L. Ed. 211, 213, 38 Sup. Ct. Rep. 53.” (Emphasis supplied.)

In *Charles Leich & Co. v. U. S.* (C. A. 7, 1954), 210 F. 2d 901, 907, the Court stated:

“The words of the statute are thus open to construction. ‘If the words are doubtful, the doubt must be resolved against the government and in favor of the taxpayer.’ *United States v. Merriam*, 263 U. S. 179, 188, 44 S. Ct. 69, 71, 68 L. Ed. 240. And, as was stated by this court in *Durkee Famous Foods, Inc. v. Harrison*, 136 F. 2d 303, 307. ‘Another rule often overlooked in construing a revenue statute is that in a doubtful situation the taxpayer is entitled to the benefit of the doubt.’ See also: *United States v. Updike*, 281 U. S. 489, 496, 50 S. Ct. 367, 74 L. Ed. 984.”

Conclusion.

For the foregoing reasons the decision entered below should be reversed.

Respectfully submitted,

RILEY & HALL, and

B. H. NEBLETT.

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APPENDIX.

Internal Revenue Code:

"Sec. 3403 (a) (b) (c), 26 U. S. C. A. of the Internal Revenue Code of 1939 (now Sections 4061, 4062, and 4063 of the 1954 Internal Revenue Code, 26 U. S. C. A.).

"Sec. 3403. Tax on automobiles, etc.

"There shall be imposed upon the following articles sold by the manufacturer, producer, or importer, a tax equivalent to the following percentages of the price for which so sold:

"(a) Automobile truck chassis, automobile truck bodies, tractors of the kind chiefly used for highway transportation in combination with a trailer or semi-trailer (including in each of the above cases parts or accessories therefor sold on or in connection there with or with the sale thereof), 2 per centum. A sale of an automobile truck shall, for the purposes of this subsection, be considered to be a sale of the chassis and of the body.

"(b) Other automobile chassis and bodies and motor cycles (including in each case parts of accessories therefor sold on or in connection therewith or with the sale thereof), except tractors, 3 per centum. A sale of an automobile shall, for the purposes of this subsection, be considered to be a sale of the chassis and of the body.

"(c) Parts or accessories (other than tires and inner tubes) for any of the articles enumerated in subsection (a) or (b), 2 per centum. *For the purposes of this subsection and subsections (a) and (b), spark plugs, storage batteries, leaf spring, coils, timers, and tire chains, which are suitable for use on or in connection with, or as component parts of, any of the articles enumerated in subsection (a) or*

(b), shall be considered parts or accessories for such articles, whether or not primarily adapted for such use. * * *” (Emphasis supplied.)

Sec. 3443 CREDITS AND REFUNDS (d) 26 U. S. C. A. of the Internal Revenue Code of 1939 (now Sections 6416(a) of the 1954 Code).

(d) No overpayment of tax under this chapter shall be credited or refunded (otherwise than under subsection (a)), in pursuance of a court decision or otherwise, unless the person who paid the tax establishes, in accordance with the regulations prescribed by the Commissioner with the approval of the Secretary, (1) that he has not included the tax in the price of the article with respect to which it was imposed, or collected the amount of tax from the vendee, or (2) that he has repaid the amount of the tax to the ultimate purchaser of the article, or unless he files with the Commissioner written consent of such ultimate purchaser to the allowance of the credit or refund.

* * * * *

Treasury Regulations 46 (1940), Sec. 316.55 (restated Section Federal Tax Regulations (1954) at page 1132)

Sec. 316.55 Definition of Parts or Accessories

“(a) The term ‘parts or accessories’ for an automobile truck or other automobile chassis or body, taxable tractor, or motorcycle, includes (1) any article the primary use of which is to improve, repair, replace, or serve as a component part of such vehicle or article, (2) any article designed to be attached to or used in connection with such vehicle or article to add to its utility or ornamentation, and (3) any article the primary use of which is in connection with such vehicle or article whether or not

essential to its operation or use. However, such term does not include tires, inner tubes, or automobile radio or television receiving sets, since these articles are expressly excluded by the statute from the tax on parts of accessories. With respect to fare registers and fare boxes for use on busses and automobiles, see §316.140.

“(b) The term ‘Parts and accessories’ shall be understood to embrace all such articles as have reached such a stage of manufacture that they are commonly or commercially known as parts and accessories whether or not fitting operations are required in connection with installation. The term shall not be understood to embrace raw materials used in the manufacture of such articles.

(c) *Spark plugs, storage batteries, leaf springs, coils, timers, and tire chains which are suitable for use on or in connection with, or as component parts of, automobile truck or other automobile chassis, taxable tractors, or motorcycles, are considered parts of or accessories for such articles whether or not primarily designed or adapted for such use. As amended T. D. 5099, 6 F. R. 6132; T. D. 5854, 16 F. R. 9465, Sept. 18, 1951.*” (Emphasis supplied.)

No. 15,007.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

BENMATT ORGANIZATION, INC.,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

On Appeal From the Judgment of the United States District
Court for the Southern District of California.

BRIEF FOR THE APPELLEE.

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Court for the Southern District of California.

BRIEF FOR THE APPELLEE.

Opinion Below.

The opinion, findings of fact and conclusions of law of the District Court [R. 17-26] are reported at 134 F. Supp. 511.

Jurisdiction.

This appeal involves manufacturer's excise taxes in the amount of \$8,501.78 paid during the period from November 1, 1947, through October 31, 1949. [R. 23.]¹ Claim

¹*Benmatt Organization, Inc. v. Riddell, Collector*, No. 15,008, is a companion case. The parties have stipulated that decision in No. 15,008 will abide final judgment in the instant case. The amount involved in No. 15,008 is \$29,783.06.

for refund was filed with the Collector at Los Angeles on December 31, 1951. [R. 6.] Such claim was denied in full on August 5, 1952. [R. 7.] Suit for refund was commenced in the District Court within the time provided for by Section 3772 of the Internal Revenue Code of 1939 on July 7, 1954. [R. 4-8.] Jurisdiction was conferred on the District Court by 28 U. S. C., Section 1346. The judgment of the District Court was entered on October 24, 1955. [R. 31.] Within sixty days, or on December 16, 1955, notice of appeal was filed by the taxpayer. [R. 31.] The jurisdiction of this Court is invoked under the provisions of 28 U. S. C., Section 1291.

Question Presented.

Whether the District Court erred in holding that taxpayer's product, a license plate frame identifying an individual automobile dealer's name and products and designed to be attached to the dealer's customer's automobile, was taxable as an automobile accessory, within the meaning of Section 3403(c) of the Internal Revenue Code of 1939.

Statute and Regulations Involved.

The pertinent statute and Regulations involved are set forth in the Appendix, *infra*.

Statement.

The pertinent facts, as stipulated [R. 14-16] and found by the District Court [R. 22-25], appear as follows:

Taxpayer is a California corporation having its principal place of business in Los Angeles. [R. 22-23.] It manufactures and sells three types of license plate frames. One type, which is the product here under con-

sideration, is manufactured for automobile dealers and advertises the dealer's name and products. [R. 23, 24.] A second type, Exhibit 1-b, bears the name of the city or state. The third Exhibit 1-c, is plain. [R. 24-25.]

The automobile dealers who purchased license plate frames for advertising with their names upon them did not charge their customers for them. The cost to the automobile dealers was reflected on their books as "advertising expense" or "other expense." [R. 24.]

The frames here in issue were purchased by automobile dealers who did not resell them. [R. 14.] On the other hand, the license plate frames which bear the name of a state or city or which are plain [Exs. 1-b and 1-c] can be purchased in any automobile accessory store. [R. 25.] In the latter connection, the parties stipulated that the managers of leading accessory stores would be willing to testify that their firms handled Types 1-b and 1-c license plate frames manufactured by taxpayer, sold them to customers in the ordinary course of business, and advertised them as commodities to be purchased for the adornment of automobiles, the protection of license plates, and the complementing of other chrome on the automobile. [R. 15-16.]

Taxpayer paid \$98,747.04 in manufacturer's excise taxes, between November 1, 1947, and March 31, 1951. On or about December 31, 1951, taxpayer filed its claim for refund in such amount, which was disallowed in full. Subsequently, taxpayer obtained written consents from ultimate purchasers (dealers) to an allowance of such refunds in the amount of \$38,284.84. Of this amount, the \$8,501.78 herein suit was paid to former Collector Harry C. Westover during the period from November 1, 1947, to October 31, 1949, inclusive. [R. 23.]

Specifically, the District Court found, with respect to the dealer plates here in issue [R. 24-25]:

VII.

The tax imposed is on the manufacturer's sale price of the manufactured article and whether the ultimate purchaser sells them or gives them away has no bearing on the tax liability of the manufacturer.

VIII.

The license plate frames in dispute are primarily adapted for use on motor vehicles. They are constructed to be affixed to automobiles by bolts, add to the utility, and become a component part of the automobile as well as an ornament. They also protect the license plate from the elements and prevent vibration.

* * *

X.

A license plate frame remains a license plate frame whether it bears an advertisement or not.

XI.

The license plate frame with the dealer's name upon it is merely a frame with advertising molded into it, and is, and remains an automobile accessory under Section 3403(c) of the Internal Revenue Code of 1939.

On the basis of his opinion [R. 17-22], findings [R. 22-25], and conclusions of law [R. 25-26], the District Court rendered judgment for the United States on October 11, 1955, which judgment was filed on October 24, 1955. [R. 30-31.] On the day of filing the judgment, taxpayer filed its written objections to the Government's proposed findings of fact and conclusions of law [R. 26-29], specifically alleging, *inter alia* [R. 27], that it had, under

the terms of the stipulation [R. 14-16], objected to the materiality, relevancy or competency of the introduction of Exhibits 1-b and 1-c, which constitute the non-dealer types of license plate frames manufactured by taxpayer. On the same day, the District Court made his order overruling this objection, which order was filed on October 25, 1955. [R. 29.] Thereupon, taxpayer filed its notice of appeal with this Court on December 13, 1955. [R. 31.]

Summary of Argument.

The District Court correctly held that dealer identification license plate frames manufactured by taxpayer were subject to excise tax as automobile "accessories," within the meaning of Section 3403(c) of the 1939 Code and Section 316.55 of Treasury Regulations 46.

Under the facts, as stipulated and found, it is clear that the subject dealer-frames—as is true of any manufactured license plate frame, whether incorporating advertising matter or not—are primarily adapted for use on automobiles, being constructed to be affixed thereto by bolts, and serving in such use to protect the license plate from the elements, to prevent vibration, and to improve, ornamentation-wise, the appearance of the car. As the District Court held, any or all of these essential characteristics of an automobile "accessory" are properly the subject of judicial notice. As additional supporting evidence, the District Court also, we submit correctly, admitted evidence, which had been stipulated to by taxpayer but was later objected to at the trial, that non-dealer frames, also manufactured by taxpayer, are sold to the public in accessory supply stores and are regarded as automobile accessories in the trade.

Patently, the above facts, as found below, come within the four corners of the established definitional requirements of an automobile "accessory" as set out in Section 316.55(a) of Treasury Regulations 46, which have long been accorded the full force and effect of law under the United States Supreme Court's decision in *Universal Battery Co. v. United States*, 281 U. S. 580. Under such established requirements, the term "accessory," in contrast to a taxable "part" and directly contrary to taxpayer's instant attempt to limit taxability to articles "basically integrated to the operational and functional needs of an automobile," expressly includes (a) "any article the primary use of which is to improve * * * such vehicle," (b) "any article designed to be attached to or used in connection with such vehicle * * * to add to its utility or ornamentation" or (c) "any article the primary use of which is in connection with such vehicle * * * whether or not essential to its operation or use." Under all of these mutually independent definitions, neither of which makes the presence or absence of advertising matter a criterion for determination of taxability, the dealer-frames here before the Court qualify on all squares, under the facts presented, as an automobile "accessory." Moreover, since the excise can properly be analogized to a sales tax on the manufacturer, in contrast to a use tax, the District Court quite properly treated the fact that advertising matter was incorporated therein and that the purchaser-dealers gave the frames to their customers as irrelevant to the determination of accessory-status.

On the other hand, the contentions raised against taxability by the taxpayer are without merit. Since the dealer-frames and the non-dealer frames manufactured by taxpayer meet all of the requirements for a taxable "acces-

sory," it is of no avail to attempt to obviate this fact of qualification for excise by attempting to fuse into the independent test for accessory-status the mutually exclusive independent test for taxability as a "part." Neither does it aid taxpayer to attempt to ignore the acknowledged fact that the Supreme Court, in *Universal Battery Co. v. United States*, *supra*, expressly directed its analysis to both the definition of a "part" and an "accessory" and placed its imprimatur on the validity and reasonableness of both tests, as used in the Treasury Regulations. Again, the cases relied on by the taxpayer in its futile attempt to avoid tax are either clearly distinguishable on the facts, as is true in *Cuno Engineering Corp. v. United States*, 43 F. 2d 259 (C. Cls.), or faulty in their analysis, as can clearly be demonstrated in the case of *Smith v. McDonald*, 214 F. 2d 920 (C. A. 3d).

Finally, taxpayer's argument that its manufacture of license frames amounted only to a sale of labor and materials is a poorly disguised attempt to ignore the obvious fact that the manufactured products are primarily adapted for attachment to automobiles and adjustable to all types of plates; its argument against the introduction in evidence of non-dealer frames, while inconsistent with its basic contention that both dealer and non-dealer frames should not be taxed, is ineffective, since such evidence, while not essential to sustain the lower court's judgment, is relevant to the advertising contention raised by taxpayer and, in any event, could be brought in by judicial notice; and, lastly, its argument for a favorable construction of Section 3403(c) loses all significance in a case where, under the strictest favorable construction possible, the facts so compellingly demonstrate that the manufactured product in question is an "accessory."

ARGUMENT.

The District Court Correctly Held That the License Plate Frames Manufactured and Sold by the Taxpayer Identifying an Individual Automobile Dealer's Name and Products, Which Was Designed To Be Attached to the Customer's Automobile—Were Taxable as Automobile "Parts or Accessories" Within the Meaning of Section 3403(c) of the Internal Revenue Code of 1939.

Under the facts as stipulated and found, we submit that the District Court correctly held that taxpayer's dealer identification license frames were subject to manufacturer's excise tax as "parts or accessories," within the established meaning of Section 3403(c) of the Internal Revenue Code of 1939 (Appendix, *infra*), as that meaning has been developed both in the relevant Treasury Regulations and by the pertinent decisions of the Courts.

A. The Statute.

Section 3403 of the Internal Revenue Code of 1939 (Appendix, *infra*), insofar as is here applicable, provides:

"SEC. 3403. TAX ON AUTOMOBILES, ETC.

"There shall be imposed upon the following articles sold by the manufacturer, producer, or importer, a tax * * *

* * * * *

"(b) [as amended by Sec. 544(a), Revenue Act of 1941, c. 412, 55 Stat. 687] *Other automobile chassis and bodies*, * * * (including in each case parts or accessories therefor sold on or in connection therewith or with the sale thereof), * * * 7 per centum. * * *

“(c) [as amended by Sec. 544(b), Revenue Act of 1941, *supra*] Parts or accessories (other than tires and inner tubes and other than radios) for any of the articles enumerated in subsection (a) or (b), 5 per centum. For the purposes of this subsection and subsections (a) and (b), spark plugs, storage batteries, leaf springs, coils, timers, and tire chains, which are suitable for use on or in connection with, or as component parts of, any of the articles enumerated in subsection (a) or (b), shall be considered parts or accessories for such articles, whether or not primarily adapted for such use. This subsection shall not apply to chassis or bodies for automobile trucks or other automobiles. * * *” (Emphasis supplied.)

B. The Treasury Regulations.

Section 316.55 of Treasury Regulations 46 (Appendix, *infra*) provides:

“Sec. 316.55 [as amended by T. D. 5099, 1941-2 Cum. Bull. 267] *Definition of Parts or Accessories*.—The term ‘parts or accessories’ for an automobile truck or other automobile chassis or body, taxable tractor, or motorcycle, includes (a) *any article the primary use of which is to improve, repair, replace or serve as a component part of such vehicle or article*, (b) *any article designed to be attached to or used in connection with such vehicle or article to add to its utility or ornamentation*, and (c) *any article the primary use of which is in connection with such vehicle or article whether or not essential to its operation or use*. However, such term does not include tires, inner tubes, and automobile radios, since these articles are expressly excluded by the statute from the tax on parts or accessories. With respect to fare

registers and fare boxes for use on busses and automobiles, see section 316.140.²

“The term ‘parts and accessories’ shall be understood to embrace all such articles as have reached such a stage of manufacture that they are commonly or commercially known as parts and accessories whether or not fitting operations are required in connection with installation. The term shall not be understood to embrace raw materials used in the manufacture of such articles.

“Spark plugs, storage batteries, leaf springs, coils, timers, and tire chains, which are suitable for use on or in connection with, or as component parts of, automobile truck or other automobile chassis, taxable tractors, or motorcycles, are considered parts of or accessories for such articles whether or not primarily designed or adapted for such use.” (Emphasis supplied.)

C. The Demonstrated Correctness of the District Court’s Application of the Statute and Regulations.

As can readily be seen from the foregoing, Section 316.55 of Treasury Regulations 46 (Point B, *supra*) enumerates *three* mutually exclusive, independent criteria for determining that a manufactured item is taxable under Section 3403(c) of the 1939 Code as a “part” or an “accessory.” In the context of the present case, the item will so qualify if: (1) Its “primary use * * * is to improve * * * such vehicle [automobile chassis or body] * * *”; (2) it is “designed to be attached to or

²Under Section 316.140 of Regulations 46, as added by T. D. 5099, *supra*, fare registers and fare boxes are taxable as business machines under Section 3406(a)(6) of the 1939 Code “and not as automobile accessories under section 3403(c), as amended.”

used in connection with such vehicle * * * to add to its utility or ornamentation"; or (3) its "primary use * * * is in connection with such vehicle * * * whether or not essential to its operation or use."

With respect to their validity, the enumerated tests for taxability set forth in the Regulations have long been accorded the full force and effect of law. In *Universal Battery Co. v. United States*, 281 U. S. 580, the Supreme Court, in 1930, had occasion to pass upon the validity of the substantially comparable Regulations defining the term "part or accessory," as used in Section 900 of the Revenue Acts of 1918, c. 18, 40 Stat. 1057, and 1921, c. 136, 42 Stat. 227.³ Speaking for a unanimous Court, Justice Van Devanter stated (pp. 583-584):

"The administrative regulations issued under §900 uniformly have construed the term 'part' in that section as meaning any article designed or manufactured for the special purpose of being used as, or to replace, a component part of such vehicle, and which by reason of some characteristic is not such a commercial article as ordinarily would be sold for general use, but is primarily adapted for use as a component part of such vehicle. The regulations also have construed the term 'accessory' as meaning any article designed to be used in connection with such vehicle to add to its utility or ornamentation and which is primarily adapted for such use, whether or not essential to the operation of the vehicle.

"The construction of those terms has been adhered to in the Internal Revenue Bureau for about ten years and it ought not to be disturbed now unless it be plainly wrong. We think it is not so,

³Section 900 of the Revenue Acts of 1918 and 1921, *supra*, was the statutory forerunner of Section 3403 of the 1939 Code.

but is an admissible construction. Certainly it would be unreasonable to hold that articles equally adapted to a variety of uses and commonly put to such uses, one of which is use in motor vehicles, must be classified as parts or accessories for such vehicles. And it would be also unreasonable to hold that articles can be so classified only where they are adapted solely for use in motor vehicles and are exclusively so used. *Magone v. Wiederer*, 159 U. S. 555, 559. *We think the view taken in the administrative regulations is reasonable and should be upheld. It is that articles primarily adapted for use in motor vehicles are to be regarded as parts or accessories of such vehicles, even though there has been some other use of the articles for which they are not so well adapted.*" (Emphasis supplied.)

Under the facts presented in the instant case,⁴ we submit that the District Court was entirely justified in applying the tests for taxability set forth in Section 316.55 of Treasury Regulations 46, with the result that it correctly determined that the dealer's identification license plate frames manufactured by taxpayer were properly taxable as "parts or accessories" under Section 3403(c). Specifically, with regard to the enumerated administrative tests, the District Court found [R. 24]:

"The license plate frames in dispute are primarily adapted for use on motor vehicles. They are constructed to be affixed to automobiles by bolts, add to the utility, and become a component part of the

⁴As the District Court pointed out [R. 21], in applying the Regulations' definitional tests for a "part" or an "accessory" under Section 3403(c), each case depends upon the particular facts presented. *Cuno Engineering Corp. v. United States*, 43 F. 2d 259, 262 (C. Cls.)

automobile as well as an ornament. They also protect the license plate from the elements and prevent vibration.”

With respect to the fact that the dealer frames contained advertising matter, the trial judge found [R. 25]:

“A license plate frame remains a license plate frame whether it bears an advertisement or not.”

Taken together, these findings, which derive their justification from the entire evidence presented, independent of the introduction of Exhibits 1-b and 1-c, to which taxpayer now strenuously objects (Br. 21), more than comply with all three of the established Regulations’ tests for determination of the character of a manufactured item as a taxable “accessory.” License plate frames, regardless of whether they bear the dealer’s name or not, are both primarily and *exclusively* used to *improve* the automobile on which they are mounted; they are designed to be bolted on—viz., *attached*—and, when mounted, insure a minimum of plate vibration as well as added protection from rust while, at the same time, improving the appearance—viz., *ornamentation*—of the car; and, finally, albeit not essential to the car’s operation and use, there would be no purpose in manufacturing the frames except for use in connection with an automobile. *Universal Battery Co. v. United States, supra*; *Masterbilt Products Corp. v. United States*, 42 F. Supp. 294, 296 (C. Cls.).

As the District Court below succinctly pointed out [R. 20], the essential findings supporting taxability in the case of license plate frames—viz., primary use, purpose to improve, fact of attachment, increment in utility and ornamentation—do not depend for their establishment on the fact that such frames are classified as automobile accessories in the trade [R. 19], since each of

these well-known characteristics are a proper subject of judicial notice. [R. 20.] *Cadwalader v. Zeh*, 151 U. S. 171, 176. Indeed, the fact that non-dealer frames are classified in the trade as automobile accessories and can be purchased at Pep Boys, Western Auto Supply, Sears, Roebuck and Co., or any other adequately stocked accessory store does not, in this context, depend on the stipulations of counsel [R. 15-16] for its factual existence; this, too, is a proper subject for judicial notice, just as is the fact that license plate frames are put to the identical use by an automobile owner and improve, add utility, and ornament his car, whether they bear the dealer's name, the owner's name, the home town's name, or serve no identification purpose whatsoever. Moreover, the fact that dealer-frames, such as those here in suit, do double duty, in that they afford an opportunity to advertise the dealer's name, is just as proper a subject of judicial notice as the foregoing observations. However, their value as an advertising medium, we submit, is derived from the fact that the ear-marked frames are automobile accessories possessing the vehicle-enhancing characteristics which prompt the recipients to mount them on their cars as such. The District Court, we submit, saw all too clearly the circuitous dilemma which, here, necessarily plagues *any* attempt to argue that license plate frames, *of any kind*, are *not* accessories, when he stated [R. 21]:

“Plaintiff has overlooked the fact that we are dealing with an excise tax on the manufacturer, which in effect is a sales tax at the source not a retailer's sales tax. The tax is on the sale price of the manufactured article and not on the use it is put to by the dealer-purchaser. The manufacturer makes these frames for a purpose and a price. Whether the dealer-purchaser gives them to his customers or sells

them is immaterial to any issue in this case. [*Williams v. Harrison*, 110 F. 2d 989; 51 Am. Juris. p. 61; 33 C. J. S., p. 111.]”

D. The Lack of Merit in Taxpayer's Arguments.

The correctness of the District Court's decision below is underscored when attention is directed to the basic inconsistencies in taxpayer's brief filed with this Court on appeal.

In combined Points I and II (Br. 6-19) taxpayer attempts to argue that no license plate frames, whether dealer-frames (Point I) or non-dealer frames (Point II) are automobile accessories for federal excise tax purposes. To make this argument, it becomes necessary (Br. 6-7) to contend that license plate frames—unlike “spark plugs, storage batteries, leaf-springs, coils, timers, and tire-chains”—do not serve “an operational and functional need of an automobile.” In view of the discussion above (Points B and C, *supra*) of the definition of *both* a *part* and an *accessory* in the applicable Treasury Regulations, the result produced is confusion of the “component part” concept with the equally significant and here controlling criteria of “improvement,” “attachment,” “utility,” “ornamentation” or “primary use” which delineate a taxable “accessory.” See also *Universal Battery Co. v. United States*, 281 U. S. 580, 583-584, where the independent definitions developed by the Treasury Regulations for both a “part” and an “accessory” are set forth and approved.

Moreover, while arguing that its non-dealer frames are *not* accessories (Br. 6), taxpayer attempts to attribute the trial judge's determination that dealer-frames *are* accessories to an alleged inadvertent misreading of the stip-

ulation [R. 15-16] as to which types of frames are sold to the general public in accessory stores (Br. 7). Such is clearly *not* the case. Finding IX [R. 25] specifically indicates that it is the *non-dealer* frames [Exs. 1-b and 1-c] to which the trial judge refers when he states in his opinion [R. 19]:

“The evidence in this case discloses that *automobile license frames* can be purchased at any automobile accessory store, *which in itself indicates their classification by the trade.*” (Emphasis supplied.)

Neither does any significance attach, for purposes of excise tax applicability, to taxpayer's bootstrap attempt to argue (Br. 7-8) that dealer frames *are* “advertising devices” exclusively, and *not* accessories, simply because they are not included in the category of frames sold in auto supply stores. That the marketing channel utilized in distributing the dealer frames has no relevance to the applicability of the definitional test for a taxable “accessory” is expressly covered by the District Court's reasoning [R. 20-21] when he points out that (a) a frame is a frame, just as a pack of matches is a pack of matches, irrespective of the advertising message it carries, and (b) the excise is on the manufacturer and not on the user, which, of course, makes the channel of distribution utilized in the case of dealer-frames an irrelevant coincidence.

The above comparison serves, further, to highlight taxpayer's unrealistic attempt (Br. 9-13) to ignore the mutually exclusive independence of accessories, vis-a-vis, parts, as a basis for excise tax liability when it discusses *Universal Battery Co. v. United States, supra*, and *Cuno Engineering Corp. v. United States, supra*. In discussing *Universal Battery* (Br. 10), taxpayer succeeds in

confusing the term “use,” as included in the quoted “rule” (Br. 9), with “utility,” which is expressly used in the Regulations’ definition of an “accessory” as approved by the Supreme Court.⁵ The attempt (Br. 10, 12), albeit futile, is one to limit taxable “use” to articles deriving their “utility” from being “basically integrated to the operational and functional needs of an automobile” and thus merge the characteristics of a taxable “part” into the clearly contrasted and independent definitional requirements of a taxable “accessory.”⁶ This, we submit,

⁵See *Universal Battery Co. v. United States*, 281 U. S. 580, 583-584. The quoted “rule” reads (p. 584):

“* * * articles primarily adapted for *use* in motor vehicles are to be regarded as *parts* or *accessories* of such vehicles, even though there has been some other use of the articles for which they are not so well adapted. (Emphasis supplied.)

As the approved definitions of “part” and “accessory,” which the Court set out (p. 583) prior to stating the above-indicated “rule,” clearly indicate, the word “use” modifies both “part” and “accessory,” whereas the word “utility,” which only appears in the definition of “accessory,” is no more significant as a touchstone for determining taxability than is “ornamentation,” with which it is alternatively linked. So appearing, it comprehends, in and of itself, an increment in “utility” apart from the obvious utility attaching to an integrated component part. In other words, in direct contradiction of the position taken by the taxpayer herein (Br. 9-13), an “accessory,” in contrast to a “part,” does not depend for its excise tax incidence on the taxable articles being integrated to the operational or functional needs of an automobile nor on its contribution to those needs. This distinction is made clear in the Supreme Court’s adoption of the two contrasting definitions (p. 583): (1) A “*part*” means “any article designed or manufactured for the special purpose of being *used as*, or to replace, a *component part* of such vehicle, and which by reason of some characteristic is not such a commercial article as ordinarily would be sold for general use, but is *primarily adapted* for use as a component part of such vehicle” (emphasis supplied); and (2) an “*accessory*” means “any article designed to be *used* in connection with such vehicle to add to its *utility* or ornamentation and which is *primarily adapted* for such use, whether or not essential to the operation of the vehicle.” (Emphasis supplied.)

⁶See fn. 5, *supra*.

amounts at best to a baseless contention which is expressly repudiated by both the provisions of Section 316.55 of Treasury Regulations 46 and by the rationale of *Universal Battery Co. v. United States*, *supra*.⁷

Apart from taxpayer's groundless attempt to argue directly against long-established definitional principles which are here controlling, the weakness of taxpayer's argument is glaringly highlighted by its contention against the District Court's taking judicial notice of the "utility and use" of the license plate frames on automobiles. Taxpayer contends (Br. 13) that no weight should attach thereto since the Court might as well take judicial notice "that thousands of automobiles do not use or employ license plate frames." This represents, we submit, merely an extension of taxpayer's distorted construction of the separate and independent definitional requirements of a "part" or an "accessory." The fallacy emerges when it is considered that thousands of cars are not equipped with spot-lights but it would take a hardy soul to argue that spot-lights are not automobile accessories.

Unconvincing also is taxpayer's strenuous argument against the District Court's refusal to treat the inclusion

⁷Taxpayer's reliance on *Cuno Engineernig Corp. v. United States*, *supra* (Br. 10-12), is likewise not warranted. Although the Court of Claims handed down its opinion in that case on June 16, 1930, a few weeks prior to the Supreme Court's decision in *Universal Battery Co. v. United States*, *supra*, the two decisions can be reconciled on their facts, which serve to distinguish the different results attained. In *Cuno Engineering*, the court found (Finding II, p. 260) that the electric cigar lighters in issue which had removable heating units, were interchangeably adaptable to both household and vehicular use and, accordingly (Finding IV(b), p. 261), that the articles sought to be taxed were *not primarily adapted* for use on motor vehicles, a deficiency which would, under the *Universal Battery Co.* definition (fn. 5, *supra*), preclude them from taxability as *either* "parts" or "accessories."

of advertising matter as determinative of accessory status. (Br. 14-19.) The first example cited (Br. 15) for the contention that such inclusion "qualifies and changes the character of such frames * * * and classifies them as advertising media or devices" is the familiar work clothing deduction, where, subject to the express limitations of Mim. 6463, 1950-1 Cum. Bull. 29, deduction is administratively allowed, in conformance with a line of earlier court decisions adverse to the Commissioner. The analogy, however, fails of persuasiveness, since the deduction, if permitted, is based on the factual determination that an expense was incurred business-wise, rather than for personal reasons. In contrast to a deduction situation, which is axiomatically a matter of legislative grace, the present case involves a manufacturer's excise tax which is assessable against taxpayer's product, by established definition, as an automobile "accessory," irrespective of whether advertising matter is affixed to the product or not. The statute and the pertinent Regulations do not make advertising a criterion for determination of accessory status and no administrative discretion in the premises is conferred under the statute. The only factual determination relevant to taxability is the determination that automobile license plate frames, regardless of whether they are essential to operation, are primarily adapted for attachment or use in connection with automobiles and improve the car or add to its utility or ornamentation.

Again, in connection with taxpayer's reliance (Br. 16-19) on *Smith v. McDonald*, 214 F. 2d 920 (C. A. 3d), we submit that the issue upon which the reversal of the District Court there was made to turn is not presented in the instant case. In the *Smith* case, the taxpayer manufactured an electric sign designed to be attached to the top of a taxicab. Over the Collector's vigorous

objection, the Third Circuit held that such taxi lights were not subject to excise tax as accessories.

We respectfully submit that the basic Section 3403(c) issue was obscured in *Smith v. McDonald, supra*, due to the Third Circuit's preoccupation with a 1941 amendment to Section 316.55 of Treasury Regulations 46 (T. D. 5099, 1941-2 Cum. Bull. 267) which obliquely touched upon the "taxicab" business in that it referred to "fare registers" and "fare boxes" and made cross-reference to Section 316.140 of Treasury Regulations 46, as added by T. D. 5099, *supra*, which provides (p. 922):

"(c) Fare registers and fare boxes for use in street cars, busses, and other vehicles are *taxable as business machines* [emphasis ours] under section 3406(a)(6) and not as automobile accessories under section 3403(c) I. R. C., as amended." (Emphasis supplied.)

Proceeding on the theory that *taxi* signs were analogous to *taxi* meters, which were thus removed from the "accessories" excise tax imposed by Section 3403(c), the Third Circuit, *we believe erroneously*, held that taxi signs were not accessories.

The fact is that Section 316.140 of Treasury Regulations 46 does not purport to hold that fare registers and fare boxes are not automobile accessories, within the meaning of Section 3403(c) of the 1939 Code. Instead, it is premised on the proposition that such devices, because they each have built-in mechanisms, qualify under *both* Section 3403(c), as "accessories," and Section 3406(a)(6), as "business machines." Since the then prevailing tax on "business machines" was ten per cent, whereas the rate on "accessories" was five per cent, the Regulations were promulgated to provide, in the interests

of securing the highest revenue, that fare registers and fare boxes would thereafter be taxed as "business machines." However, since such an administrative decision did not alter the realistic fact that the products in question also remained "accessories," in order to prevent the devices from being taxed *twice* (first, as "accessories" and, secondly, as "business machines"), Section 316.140 announced that they would *not* be *taxable* as "accessories," under Section 3403(c). In other words, the fact that Section 316.55 of Treasury Regulations 46 was amended in 1941, with the result described above, furnishes no precedent whatsoever for the Third Circuit's determination that electric taxi signs attached to the top of taxicabs are not accessories. On the basis of the Third Circuit's own treatment of them as analogous to fare registers and fare boxes, which are and remain automobile accessories, they should properly be regarded, for excise tax purposes, as "accessories," within the meaning of Section 3403(c).

In any event, since, in the present case, unlike *Smith v. McDonald, supra*, there is no administrative determination that dealers' automobile license frames should be taxed in any category *other* than as automobile accessories, it can readily be seen that such frames, since their manufacture, sale, and use fully comply factually with the definitional requirements of an "accessory," within the meaning of Section 316.55 of Treasury Regulations 46, should properly be taxed under Section 3403(c). *Smith v. McDonald, supra*, insofar as it involved an administrative option as to a choice between two equally applicable excises, can here be considered distinguishable. However, since the result reached was to hold attached taxi signs not to be "accessories," it should not here be fol-

lowed as a precedent. For a well-considered judicial opinion analyzing *Smith v. McDonald*, *supra*, and reaching the same conclusion expressed above, see *Masao Hirasuna v. McKenney*, 135 F. Supp. 897 (Hawaii) (now pending on appeal before this Court). There, Chief Judge McLaughlin stated, *inter alia* (p. 899):

“Tires and inner tubes are indisputably parts or accessories for automobiles. Yet, like radios, tires and inner tubes are excluded from the tax in the same paragraph. Exclusion does not determine status for Congress may exclude any article from taxation even though such article is clearly a part or accessory. Indeed, the more reasonable construction is that Congress excluded these items from the tax because otherwise they would be taxable as parts or accessories. Fare registers and fare boxes are taxed as business machines and exempt as parts or accessories lest a taxpayer be twice taxed for the same items. This tax pattern also achieves desirable uniformity without doing violence to the definition of parts and accessories. The enumeration of these items does not serve as examples of what is not an accessory, but merely enumerates what shall not be taxed as accessories. It hence cannot be relied on as a test of what is an accessory. Concededly these affixed electric advertising signs do not add to the utility of an automobile used as a taxicab. However, the definition of parts or accessories under the regulations includes ‘any article the primary use of which is in connection with such vehicle or article whether or not essential to its operation or use.’ 26 C. F. R. § 316.55. The electric signs come within the four corners of this definition.”

Taxpayer's final three arguments (Br. 19-23) are equally unconvincing. In Point III (Br. 19-20), it attempts to analogize its manufacture of dealer plate frames to a sale of labor and materials, rather than the manufacture of frames as "automobile accessories." The argument here is really an extension of its argument, considered above, that dealer frames are advertising devices, since it is the impression of the dealer's name and product on the dealer frame which distinguishes it from the non-dealer frame. The argument loses its effectiveness when it is considered that *any* manufactured "accessory" involves labor and materials and *any* special "part" or "accessory" does not lose its character as such because it is manufactured for sale to a particular customer, rather than for sale to the general public. Again, *Masao Hirasuna v. McKenney, supra*, (now pending on appeal before this Court), stands as a decision contrary to the two authorities cited by the taxpayer, both of which are factually distinguishable from the instant case.

Point IV of taxpayer's argument (Br. 21) constitutes a renewal of its earlier entered and overruled [R. 29] objection to the introduction of Exhibits 1-b and 1-c, the non-dealer frames. As has been developed in Point C, *supra*, such evidence was not essential to the District Court's findings [R. 22-25] and conclusions [R. 25-26] and had specific relevancy only with respect to Finding IX [R. 25], which, while constituting supporting material, was based expressly on Exhibits 1-b and 1-c. However, in view of taxpayer's present argument (Point II,

Br. 6-19) that non-dealer frames are not “automobile accessories,” coupled with insistence that, even if they were (Br. 15), the inclusion of advertising matter would change their taxable character (Br. 14-15), it becomes relevant to consider the characteristics of non-dealer frames, as they are considered in the trade, to reach the here sound conclusion that the presence or absence of advertising matter is entirely irrelevant to the determination of “accessory” status within the meaning of Section 3403(c).

Taxpayer’s final argument (Point V, Br. 21-23) that the statute should be construed favorably to it lacks persuasiveness since there is here no doubt as to the applicability of Section 3403(c), under the facts presented. As has been pointed out in Point C, *supra*, the Regulations clearly define the term “part” and “accessory,” as used in the statute. Under *Universal Battery Co. v. United States*, *supra*, it has been long settled that the pertinent Regulations are entitled to be accorded the full force and effect of law. And as was observed with respect to the electric taxicab signs in *Masao Hirasuna v. McKenney*, *supra*, page 899, the dealer frames here in issue clearly “come within the four corners of this definition.” Accordingly, the statute, however strictly construed, is satisfied.

Conclusion.

For the reasons given above, the judgment of the District Court should be affirmed.

Respectfully submitted,

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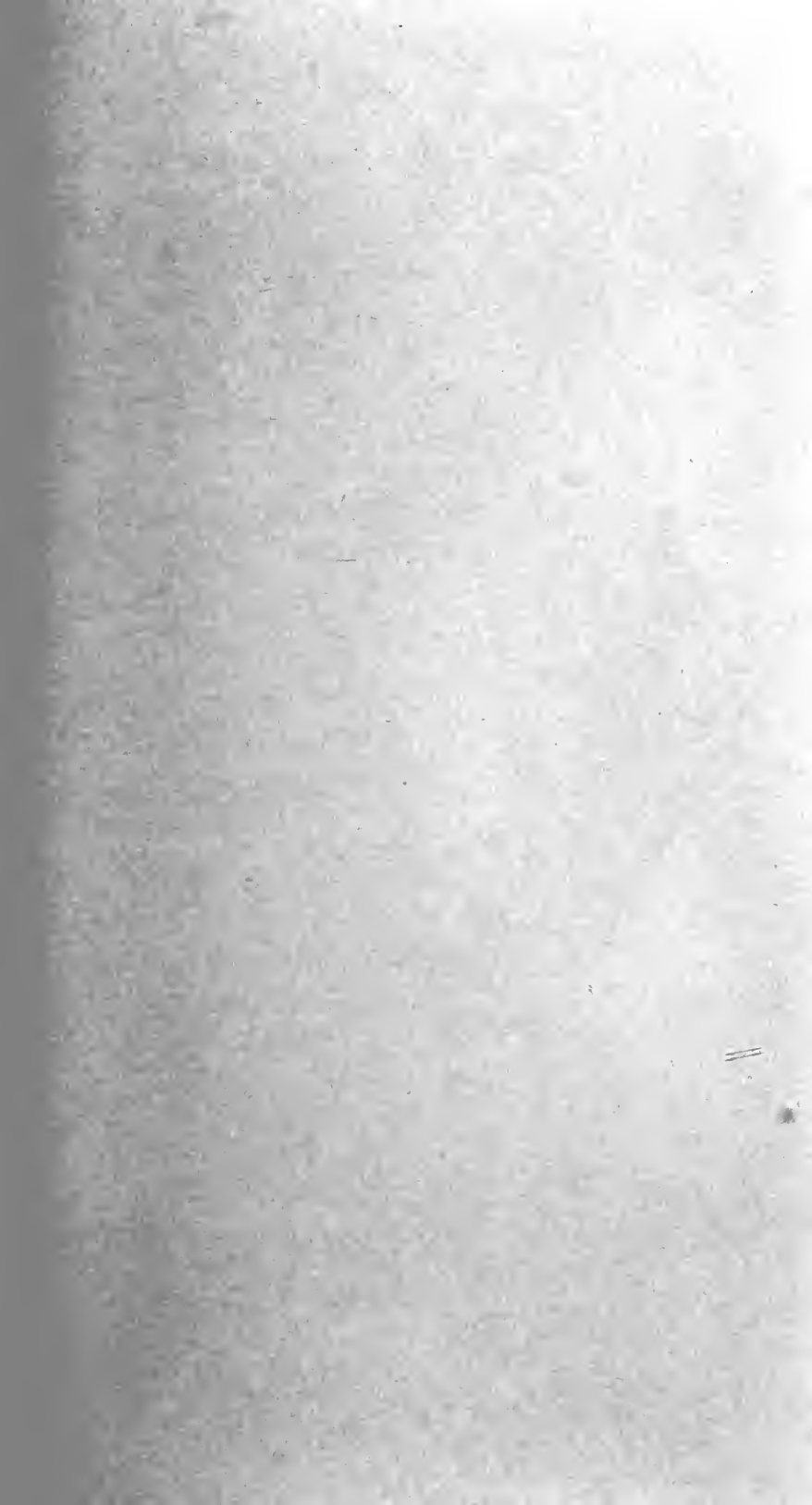
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APPENDIX.

Internal Revenue Code of 1939:

"SEC. 3403. TAX ON AUTOMOBILES, ETC.

"There shall be imposed upon the following articles sold by the manufacturer, producer, or importer, a tax equivalent to the following percentages of the price for which so sold:

"(a) [as amended by Sec. 544(a), Revenue Act of 1941, c. 412, 55 Stat. 687] Automobile truck chassis, automobile truck bodies, automobile bus chassis, automobile bus bodies, truck and bus trailer and semitrailer chassis, truck and bus trailer and semitrailer bodies, tractors of the kind chiefly used for highway transportation in combination with a trailer or semitrailer (including in each of the above cases parts or accessories therefor sold on or in connection therewith or with the sale thereof), 5 per centum. A sale of an automobile truck, bus, or truck or bus trailer or semitrailer, shall, for the purposes of this subsection, be considered to be a sale of the chassis and of the body.

"(b) [as amended by Sec. 544(a), Revenue Act of 1941, *supra*] Other automobile chassis and bodies, chassis and bodies for trailers or semitrailers suitable for use in connection with passenger automobiles, and motorcycles (including in each case parts or accessories therefor sold on or in connection therewith or with the sale thereof), except tractors, 7 per centum. A sale of an automobile, trailer, or semitrailer shall, for the purposes of this subsection, be considered to be a sale of the chassis and of the body.

"(c) [as amended by Sec. 544(b), Revenue Act of 1941, *supra*] Parts or accessories (other than tires and inner tubes and other than radios) for

any of the articles enumerated in subsection (a) or (b), 5 per centum. For the purposes of this subsection and subsections (a) and (b), spark plugs, storage batteries, leaf springs, coils, timers, and tire chains, which are suitable for use on or in connection with, or as component parts of, any of the articles enumerated in subsection (a) or (b), shall be considered parts or accessories for such articles, whether or not primarily adapted for such use. This subsection shall not apply to chassis or bodies for automobile trucks or other automobiles. Under regulations prescribed by the Commissioner, with the approval of the Secretary, the tax under this subsection shall not apply in the case of sales of parts or accessories by the manufacturer, producer, or importer to a manufacturer or producer of any of the articles enumerated in subsection (a) or (b). If any such parts or accessories are resold by such vendee otherwise than on or in connection with, or with the sale of, an article enumerated in subsection (a) or (b) and manufactured or produced by such vendee, then for the purposes of this section the vendee shall be considered the manufacturer or producer of the parts or accessories so resold."

* * * * *

(26 U. S. C. 1952 ed., Sec. 3403.)

Treasury Regulations 46 (1940 ed.):

"Sec. 316.55 [as amended by T. D. 5099, 1941-2 Cum. Bull. 267]. *Definition of Parts or Accessories.*

—The term 'parts or accessories' for an automobile truck or other automobile chassis or body, taxable tractor, or motorcycle, includes (a) any article the primary use of which is to improve, repair, replace or serve as a component part of such vehicle or article, (b) any article designed to be attached to

or used in connection with such vehicle or article to add to its utility or ornamentation, and (c) any article the primary use of which is in connection with such vehicle or article whether or not essential to its operation or use. However, such term does not include tires, inner tubes, and automobile radios, since these articles are expressly excluded by the statute from the tax on parts or accessories. With respect to fare registers and fare boxes for use on busses and automobiles, see section 316.140.

“The term ‘parts and accessories’ shall be understood to embrace all such articles as have reached such a stage of manufacture that they are commonly or commercially known as parts and accessories whether or not fitting operations are required in connection with installation. The term shall not be understood to embrace raw materials used in the manufacture of such articles.

“Spark plugs, storage batteries, leaf springs, coils, timers, and tire chains, which are suitable for use on or in connection with, or as component parts of, automobile truck or other automobile chassis, taxable tractors, or motorcycles, are considered parts of or accessories for such articles whether or not primarily designed or adapted for such use.”

* * * * *



No. 15007.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

BENMATT ORGANIZATION, INC.,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLANT'S REPLY BRIEF.

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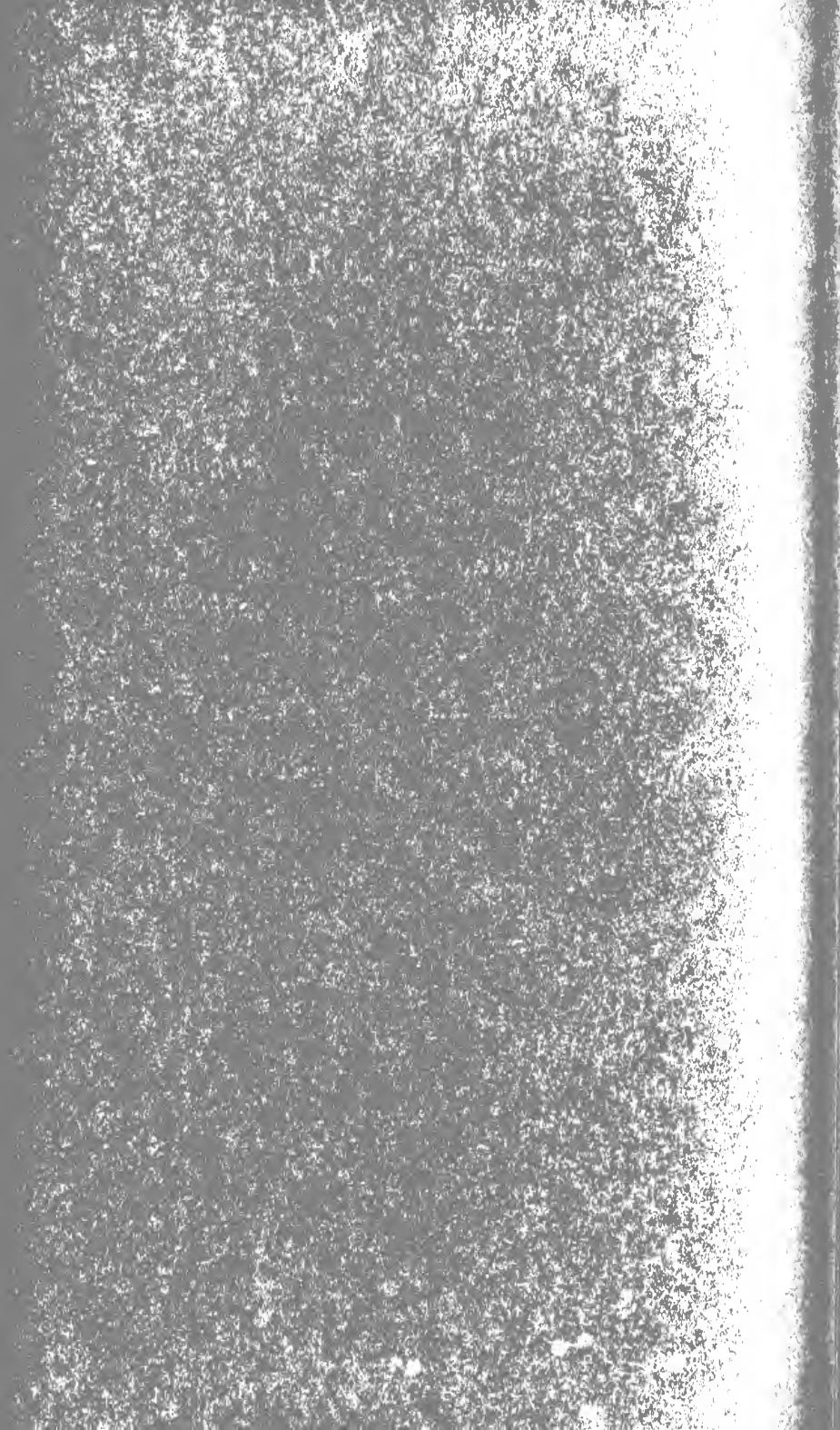
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No. 15007.

IN THE

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FOR THE NINTH CIRCUIT

BENMATT ORGANIZATION, INC.,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLANT'S REPLY BRIEF.

I.

Appellee's Brief Totally Fails to Comprehend and Apply the Well Established Rule of Statutory Construction, Commonly Known as the "Ejusdem Generis" Rule, That Is, That General Words in a Statute Will Be Considered as Including Only Articles of the Same Kind, Class, Character or Nature as Those Specifically Enumerated in the Statute.

Appellant's Opening Brief pointed out that Section 3403(c) specifically enumerated six articles, which shall be considered "parts or accessories", namely, "spark plugs, storage batteries, leaf springs, coils, timers and tire chains"; that these six named articles were deliberately placed in the statute as a guide in defining the generic

term “parts or accessories”; that each named article served an operational and functional need on an automobile and each is related to the machine’s utility; and that Treasury Regulation 46, Section 316.55, repeats the same six named articles referred to in Section 3403(c), *supra*, thereby adopting the expressed classification set out in the statute. In the present case, there is no similarity between automobile dealer frames and any one of the articles specifically enumerated in Section 3403(c) and Treasury Regulation 46, Section 316.55, nor can such frames be considered as being in the *same class or kind of articles* as any of those enumerated in said section.

Obviously, the rule of “*ejusdem generis*” is applicable in the present case and this rule has been consistently applied in construing provisions of the Internal Revenue Code imposing excise taxes.

A scholarly presentation of this rule is found in *Geer v. Birmingham* (D. C. Iowa, 1950), 88 Fed. Supp. 189, 224. This was a suit against the Collector to recover cabaret taxes. The District Court held that a ballroom which made an admission charge, and in connection therewith furnished lounge space serving 17½% of the capacity of its dance floor, and which operated a fountain which sold tobacco, soft drinks and confections at retail prices, but no meals, was not a roof garden, cabaret or other similar place, and hence was not subject to the Federal cabaret tax.

District Judge Graven, in the course of his opinion, stated:

“It would therefore seem necessary in the present case to consider the applicability to the statute and regulations in question of the rule commonly known as the ‘ejusdem generis’ rule, *i. e.*, ‘of the same kind, class or nature.’ *That rule is to the effect that where in a statute general words follow a designation of particular subjects the meaning of the general words will ordinarily be presumed to be restricted by the words of particular designation. The general words will be regarded as including only things of the same kind, class, character or nature as those specifically enumerated and such words will not be given the wide and comprehensive signification that they would be given if they stood alone.* 50 Am. Jur. pp. 244, 245; 28 C. J. S., pages 1049-1050. The rule has been applied in construing provisions of the Internal Revenue Code imposing excise taxes. *White, Collector v. Aronson*, 1937, 302 U. S. 16, 20, 58 S. Ct. 95, 82 L. Ed. 20; *United States v. Phez Co.*, 9 Cir., 1928, 28 F. 2d 106, 107; *Feitler v. Harrison*, 7 Cir., 1942, 126 F. 2d 449, 451. *In all three of the above-cited cases it was held that the particular designation in the statute of the articles subject to the excise tax followed by general words of designation brought into the list of taxables only those articles which were similar to those particularly named and with which they were closely associated.* The rule of ‘ejusdem generis’ is to be used as an aid in ascertaining the true intention of a statute and not to thwart it. *United States v. Gilliland*, 1941, 312 U. S. 86, 93, 61 S. Ct. 518, 85 L. Ed. 598. The rule serves to prevent general words from extending their operations into a field not intended. *Phillips v. Houston Nat. Bank*, 5 Cir., 1940, 108 F. 2d 934, 936. The

rule of ejusdem generis is the specific application of the broader rule known as 'noscitur a sociis', *i. e.*, 'it is known from its associates'. See *Eastman v. Armstrong-Byrd Music Co.*, 8 Cir., 1914, 212 F. 662, 667, 52 L. R. A. N. S. 108. That rule is also sometimes referred to as the rule that, 'words are known by the company they keep'. The rule of *noscitur a sociis* is to the effect that the meaning of doubtful words may be ascertained by reference to the meanings of words associated with them." (Emphasis supplied.)

Clearly, therefore, the six articles enumerated in Section 3403(c) and Treasury Regulation 46, Section 316.55, express the intent and purpose of the statute and the regulations to impose a tax *only* on such articles as are of the "same kind, class or nature" as those specifically enumerated therein.

In *White v. Aronson* (1937), 302 U. S. 16, 20, the Supreme Court affirmed this rule of statutory construction. The question was whether jig-saw picture puzzles were games and the Court held that they were not. The Court stated at page 21:

"The Circuit Court of Appeals rightly concluded that the words 'games and parts of games' bring into the list of taxables only such other articles as are used in games of contest, *the same as those particularly named there and with which they are closely associated.*" (Emphasis supplied.)

II.

Appellee Has Misconceived the Rule in *Universal Battery Co. v. United States* (1930), 281 U. S. 580, and Misapplied It to the Factual Situation in the Present Case.

The rule in *Universal Battery Co. v. United States*, *supra*, must be construed in relation to its particular facts. The articles involved were *storage batteries, gascolators, parts to speedometers and brackets and fittings for use as replacement parts for bumpers on automobiles*. Each article above named is specifically integrated to the operational and functional needs of an automobile and to its use and utility. Each article is of the "same kind, class or nature" comprehended by Section 3403(c) and Treasury Regulation 46, Section 316.55. (*Geer v. Birmingham*, *supra*; *United States v. Phez Co.* (C. A. 9th, 1928), 28 F. 2d 106, 107.)

In interpreting and applying the rule in *Universal Battery Co.*, *supra*, appellee seems to overlook that the general language of opinions must be read in connection with the facts. Generalizations are apt to mislead if one fails to remember that "General propositions do not decide concrete cases." (*Holmes, J.*, dissenting in *Lochner v. New York* (1905), 198 U. S. 45, 76.)

Appellee, hence, is proceeding on a mistaken theory and is reaching an exactly opposite conclusion from what the rule announced in the *Universal Battery* case actually and judicially means. The Supreme Court, following its comments on the regulations in that case, stated the rule applicable to "parts or accessories":

"It is that articles primarily adapted for use in motor vehicles are to be regarded as parts or accessories of such vehicles, even though there has been

some other use for the articles for which they are not so well adapted. It remains to apply that view to the case in hand."

Based on the specific articles enumerated in the *Universal Battery* case, the Court distilled and stated the rule to be applied in defining "parts or accessories." The Court bottomed the rule on articles *primarily adapted* for use on motor vehicles. The factors urged by appellee were deliberately omitted in the Supreme Court's phrasing of the rule. Nothing is said in the rule about "ornamentation". *Primarily adapted* must be construed in relation to and necessarily confined to the class of articles involved in the *Universal Battery* case, namely, *storage batteries, gascolators, parts to speedometers, and brackets and fittings for use as replacement parts for bumpers on automobiles*. Each such article is basically integrated to the operational and functional needs of an automobile. Each article is within *the class of articles* comprehended and enumerated by Section 3403(c) and Treasury Regulation 46, Section 316.55, paragraph (c). (App. Op. Br., App. p. 3.) It would seem that appellee's super-technical and attenuated argument *re* "accessories, vis-a-vis; parts" (Br. pp. 16-17) cannot be reconciled with the above interpretation of the rule in the *Universal Battery* case.

In *White v. Aronson, supra*, the Supreme Court in further negation of appellee's argument, said:

"Of course, the general language of opinions must be read in connection with the facts."

Appellee has not observed this cardinal principle in interpreting the rule announced in the *Universal Battery* case.

Finally, in *White v. Aronson*, *supra*, the Supreme Court, in a similar factual situation, said:

“Where there is a reasonable doubt as to the meaning of a taxing act, it should be construed most favorably to the taxpayer. *Gould v. Gould*, 245 U. S. 151, 62 L. Ed. 211, 28 S. Ct. 53: ‘Tax laws, like all other laws, are made to be obeyed. They should therefore be intelligible to those who are expected to obey them. *Philadelphia Storage Battery Co. v. Lederer*, D. C. 21 F. 2d 320, 321, 322.’” (See App. Op. Br., Point V.)

III.

Appellee’s Attempt to Distinguish *Smith v. McDonald* (C. A. 3d 1954), 214 F. 2d 920, and *Cuno Engineering Corp. v. United States* (1930), 43 F. 2d 259, Is Not Convincing.

Appellee argues, in commenting on *Smith v. McDonald*, *supra*, that the “* * * Third Circuit’s preoccupation with the 1941 Amendment to Section 316.55 of Treasury Regulation 46” relating to fare registers and fare boxes, caused it “erroneously” to hold that “taxi signs were not accessories”. Appellee then goes on to say: “However, since the result reached was to hold attached taxi signs not to be ‘accessories’, it should not here be followed by a precedent.” The net effect of appellee’s argument is that *Smith v. McDonald*, *supra*, should be overruled. Appellant’s view that *Smith v. McDonald* case is applicable here, is further fortified by the following language from the Court’s opinion:

“It may be observed that the Treasury Department has held that emblems designed to be attached to automobiles to show membership in automobile clubs, societies, etc., *are not taxable as automobile accessories*, S. T. 409, II-1, C B 285.”

The above statement has no relation whatever to the Third Circuit's alleged "preoccupation" with the 1941 Amendment to Section 316.55 of Treasury Regulation 46. Under the reasoning of *Smith v. McDonald, supra*, the electrical taxi signs and emblems are advertising devices. The dealer frames are in the same category and are accessory to the dealer's business and not to the automobile. (App. Op. Br. pp. 16-18.)

With respect to *Cuno Engineering Corp. v. United States, supra*, appellee argues that the cigar lighters and ash receivers are not primarily adapted for use on motor vehicles and attempts to distinguish the case on that basis. (Br. p. 18.) The case may not be disposed of in such summary fashion. In a well reasoned opinion (App. Op. Br. pp. 10-11), the Court clearly and unequivocally distinguished between *extraneous articles* attached to automobiles, such as license frames, "and ones so intimately connected with its safe operation and functioning elements that it becomes a component part of the machine's utility." The Court further stated:

"Aside from the general commercial value of the devices here involved, it is difficult to see how they, in any wise, prolong the life of a car, aid in its operation or function to overcome any of the various difficulties dependent upon the car's operation, or the incidental inconveniences of automotive travel."

The whole basis of the Court's opinion was that an article, to be an *accessory*, must serve some operational and functional need of an automobile and be related to the machine's utility.

Moreover, in the *Cuno Engineering* case, the Court said:

"The installation of a cigar lighter and ash receiver is manifestly a convenience to *smokers occupy-*

ing an automobile. It may or may not add to the ornamentation of a car. This is a matter of taste. The defendant asserts that Congress meant to tax articles used on or in connection with automobiles. If so the taxing statute has not been so construed." (Emphasis supplied.)

Obviously, the case, when properly analyzed, supports our position herein and confirms our understanding of the rule announced in *Universal Battery Co. v. United States, supra*, as to what constitutes an automobile "accessory."

IV.

Automobile Dealer Frames Represent the Sale of Labor and Material and Are Not Sales of Dealer Frames as Automobile "Accessories."

Appellant, in its opening brief, cited two cases in support of the theory that dealer frames represent the sale of labor and material, namely, *Johnny and Mack, Inc.*, D. C. Fla. (1954), 123 Fed. Supp. 400, and *Bacon and Van Buskirk Glass Co. v. Luckenbill* (D. C. Illinois, 1955), 55-1, U. S. T. C. para. 49, 124, C. C. H. 1956, Vol. 5, page 51, 102. (Br. pp. 19-20.) These cases hold that the manufacture and sale of seat covers and automobile windshields represent the sale of labor and material and may not be taxed as automobile "accessories."

Appellant also pointed out in its opening brief that *Masao Hirasuna v. McKenney* (D. C. Hawaii, 1955), 135 Fed. Supp. 897 (now on appeal to this Court), asserted a contrary view. In this case, seat covers were held to be an accessory within the meaning of Section 3403(c) and the applicable regulations.

In a recent case, *H. H. Keeton, Sr., trading and doing business as Virginia Auto Top Company v. United States* (April 24, 1956), 1956 C. C. H. para. 9487, p. 55,291, involving seat covers, District Judge Hutcheson, commenting on the *Hirasuna* case, stated: "I am unable to accept the reasoning of the learned Judge in this respect" and followed the reasoning of *Bacon and Van Buskirk* and *Cotter v. Luckenbill* cases, *supra*. The District Court then stated that:

"The United States District Court of Connecticut in 1926 decided the case of *John J. Roche Co. v. Eaton*, 14 Fed. (2d) 857. The facts in that case were essentially on all fours with the case at bar except that the plaintiff in the Roche case performed auto repairs *in addition to custom slip covers*. The Internal Revenue Service has undertaken to distinguish the Roche case from the type of case at bar. However, I think they are undistinguishable and that the conclusions in the Roche case are sound. In the Roche case the Court uses language appropriate to the instant case:

"I hold that the dominant aspect of the transactions engaged in by the plaintiff was that of work performed. Materials were, of course, supplied; but the fact that these materials were not manufactured en masse, *but were fashioned specially in each instance for a specific customer, makes the furnishing of them but an incident of the major transaction.*

"In view of the foregoing reasoning, I hold that the work done by plaintiff does not come within the meaning of Section 2403(c), *supra*, and consequently plaintiff is not a manufacturer of auto accessories within the meaning of the statute." (Emphasis supplied.)

Admittedly, the above cases express sharply opposing views with respect to whether or not seat covers and glass for windshields on automobiles represent the sale of labor and material rather than "accessories". The ratio of these decisions, however, is four to one in favor of the taxpayers.

In the present case, the dealer frames were not manufactured en masse and carried in stock for sale to any person or persons, but were fashioned specifically in each instance for specific auto dealers. They are cut from large metal sheets and are not carried in stock and sold over the counter to customers in the normal course of business. In this respect, dealer frames are analogous to the factual situation in *Johnnie and Mack, Inc.*; *Bacon and Van Buskirk Glass Co.*; *H. H. Keeton, Sr.* and *John J. Roche* cases, above mentioned.

Conclusion.

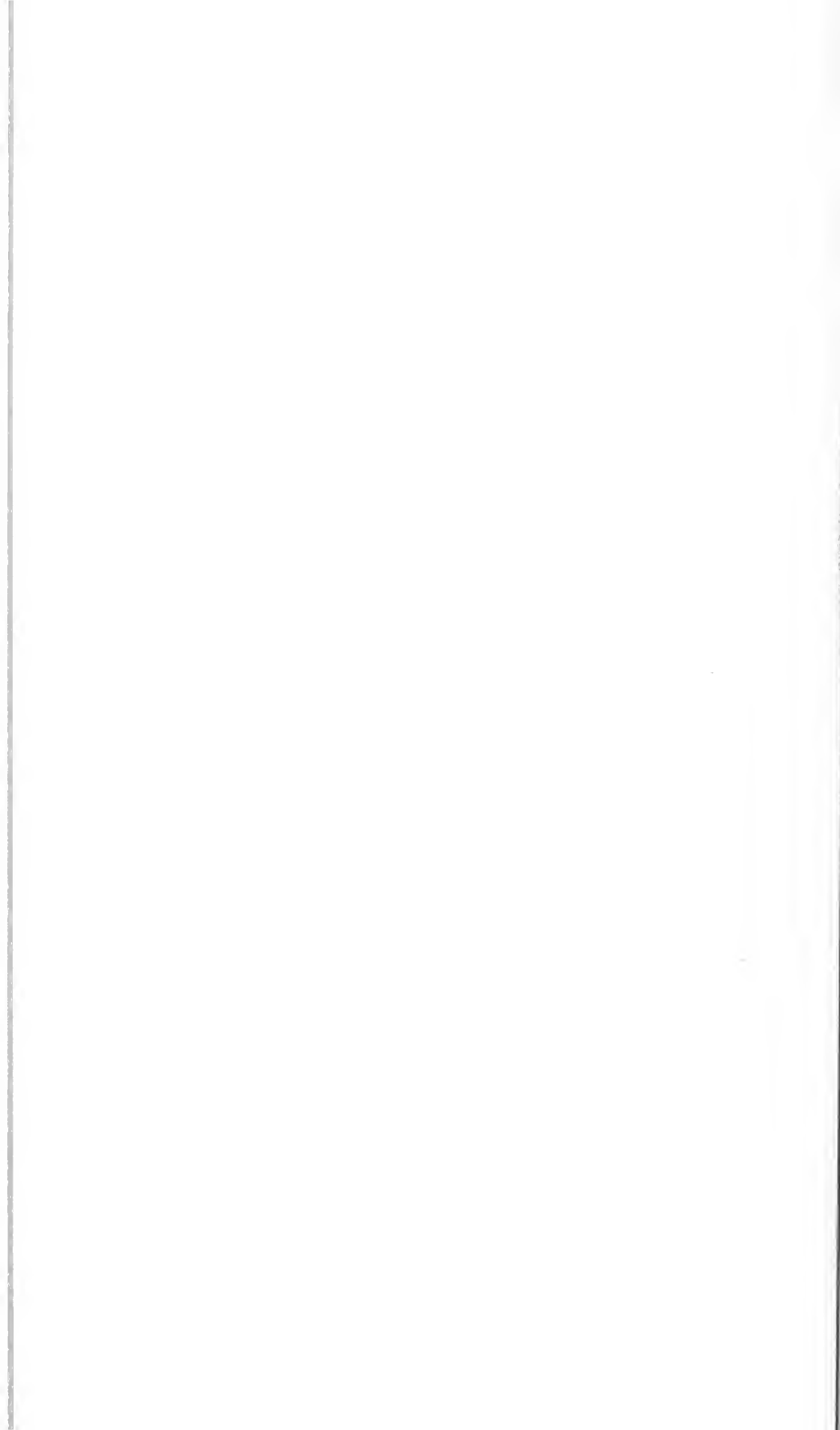
For the foregoing reasons, the decision entered below should be reversed.

Respectfully submitted,

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No. 15,009

IN THE

United States Court of Appeals
For the Ninth Circuit

In the Matter of Application for
Citizenship of:

ALEJO TRABOCO TANO, et al.,

Appellants,

vs.

UNITED STATES IMMIGRATION AND NAT-
URALIZATION DEPARTMENT,

Respondent.

APPELLANTS' OPENING BRIEF.

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FILE

JUN -5 1956

PAUL P. O'BRIEN, CL



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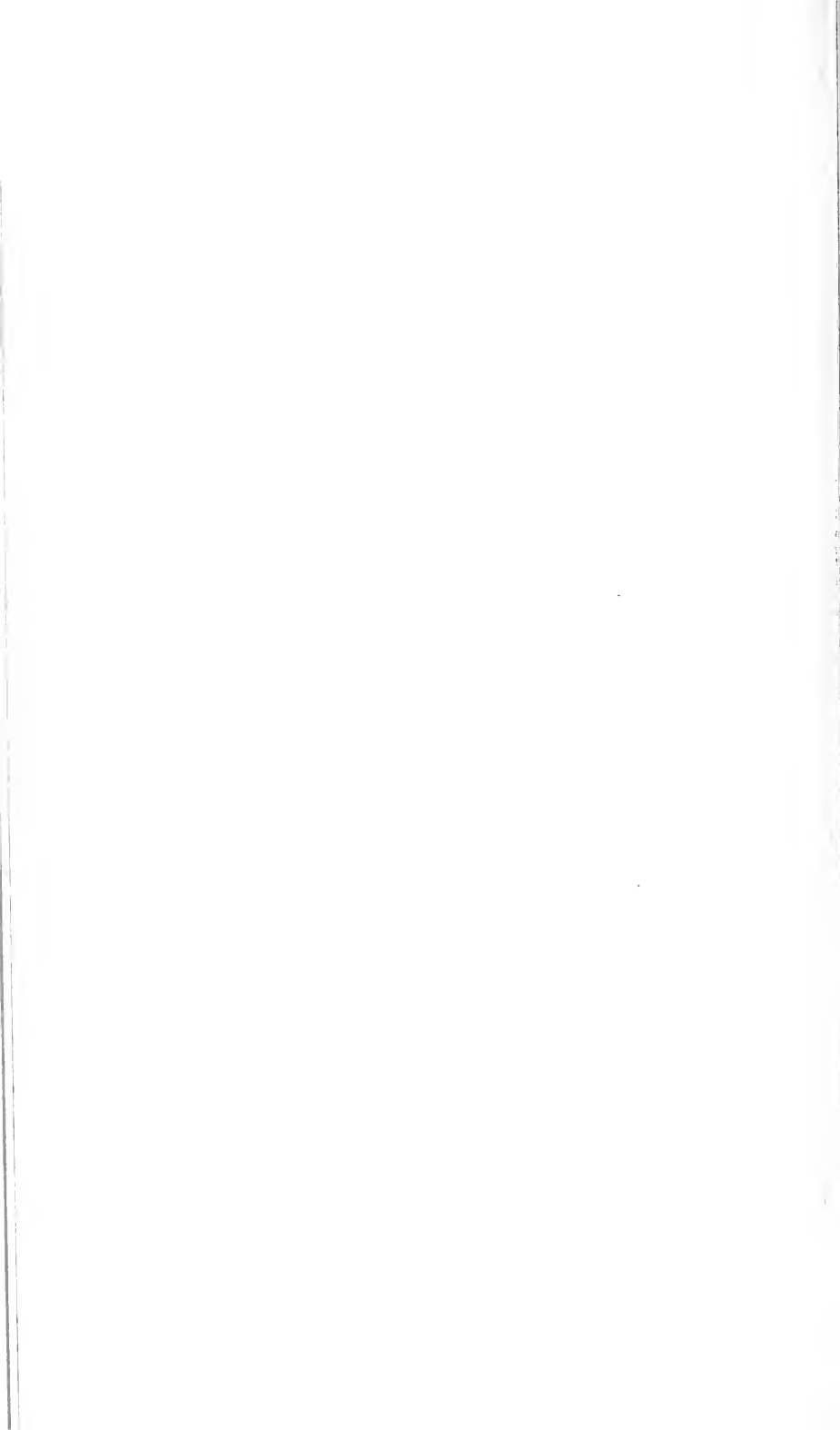
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Respondent.

APPELLANTS' OPENING BRIEF.

PRELIMINARY STATEMENT.

This is a consolidated appeal on behalf of seven appellants who filed petitions for naturalization on March 31, 1955. The Naturalization Examiner entered findings of fact and conclusions of law on August 17, 1955, recommending that the petitions be denied, and the petitions came on for hearing on August 23, 1955, in the United States District Court for the Northern District of California, Southern Division, Judge Louis E. Goodman presiding. The written opinion and order of the Court was filed on October 25, 1955, denying

the petitions. Findings of fact and conclusions of law were lodged by the United States and by petitioners on November 3, 1955, and the Court entered its findings of fact and conclusions of law and order denying the petitions on November 4, 1955. Notices of appeal were filed on behalf of all petitioners on December 2, 1955, and on the same day, the District Court ordered the cases consolidated for any further proceedings. This Court granted the motion of appellants for leave to appeal on a typewritten record.

This Court has jurisdiction of the appeal under Section 1291 of Title 28, United States Code.

STATEMENT OF FACTS.

The only real issue presented by these petitions for naturalization and by this appeal, is whether or not the appellants have met the residence requirement which entitles them to be naturalized. The Government has never contended, nor is there any finding by the Court below, that these petitioners have not satisfied the other requirements for naturalization (set forth in 8 U.S.C.A. §1427). If, as a matter of law, the appellants have met the residence requirement, they are entitled to naturalization.

The changes in the law pertaining to the residence requirement are set forth in the opinion of the District Court and will not be repeated here. In short, the requirement that a petitioner has resided within the United States for five years, was dispensed with by

Section 325(a) of the Nationality Act of 1940, as to seamen who earned five years sea time on American vessels, whether or not such seamen had been admitted to the United States for permanent residence. 54 Stat. 1150, 8 U.S.C. §725(a), 1946 ed. This section was amended by the Internal Security Act of 1950, 64 Stat. 987, to provide that only seamen who had first been admitted to the United States for permanent residence could substitute sea time on American vessels for residence within the United States. This provision of the Internal Security Act of 1950 was substantially re-enacted in the Nationality Act of 1952, 66 Stat. 163, with the added provision that seamen could claim the benefits of the 1940 Act as it stood prior to its amendment by the Internal Security Act of 1950, if such seamen filed their petitions for naturalization before December 24, 1953.

The Nationality Act of 1952 also contains an extremely comprehensive savings clause which provides in material part:

“Nothing contained in this Act, unless otherwise specifically provided therein, shall be construed to affect the validity of any . . . petition for naturalization . . . which shall be valid at the time this Act shall take effect; or to affect any . . . right in process of acquisition, act, thing, . . . or matter . . . done or existing at the time this Act shall take effect; but as to all such . . . rights, acts, things, . . . or matters the statutes or parts of statutes repealed by this Act are, unless otherwise specifically provided therein, hereby continued in force and effect . . .”

§405(a), 66 Stat. 280, 8 U.S.C. §1101 note.

Section 403(42) of the 1952 Act specifically repealed the entire 1940 Act in these words:

“(a) The following acts and all amendments thereto and parts of acts and all amendments thereto are repealed: . . . (42) Act of October 14, 1940 (54 Stat. 1137) . . .”

None of the appellants has been admitted to the United States for permanent residence. The District Court found that appellants Tano, Elizalde, and Romano have earned at least five years sea time prior to September 23, 1950; the District Court also found that appellants Polintan, Magallanes, Martinez, and Abella have earned 11 days, 27 days, 45 days, and 702 days, respectively, less than five years sea time prior to September 23, 1950. Each of the latter group of appellants was signed on by the Military Sea Transportation Service (MSTS) in his native country, The Philippines, at the end of World War II when there was a great shortage of men to man the ships of that service. In 1949 each of these appellants was discharged, against his will, from his ship while in port in the United States, and was ordered by the MSTS to stay ashore subject to recall at any time for service on a MSTS vessel. Each of them spent some time ashore under these conditions and each was later recalled for further service on MSTS vessels. Appellant Abella, in addition, served ashore in the Philippines from March, 1944, until July, 1946, as a clerk for the United States Maritime Commission, in the personnel section. These varying amounts of shoreside service were not counted by the District Court in computing the sea time earned by this latter group of appellants.

All of the appellants offered evidence to show that between December 24, 1952, and December 24, 1953, they had attempted to file petitions for naturalization, but were told by a clerk of the Immigration Service that they had insufficient sea time and that they should not file their petitions. They contended below that in view of the fact that they were not thoroughly familiar with the language and customs of this country, that they had done all that could reasonably be expected of them in filing their petitions before December 24, 1953, and had thus substantially complied with §330(a)(2) of the 1952 Act. The District Court ruled against this contention and that ruling constitutes its only conclusions of law. But the written opinion of the District Court indicates that the District Court concluded that these appellants cannot claim any benefits under the savings clause of the 1952 Act, solely for the reason that those benefits could not be claimed immediately prior to the enactment of the 1952 Act.

SPECIFICATION OF ERRORS.

1. The District Court erred in denying petitioners' petitions for naturalization in that the District Court failed to hold that each petitioner's condition, status and rights in process of acquisition, earned under Section 325 of the Immigration and Nationality Act of 1940, were preserved by the savings clause of the Immigration and Nationality Act of 1952.

2. The District Court erred in denying petitioners' petitions for naturalization in that the District Court

failed to hold that the first attempt of each petitioner to file his petition for naturalization, which attempts were made within the time limit set forth in Section 330(a)(2) of the Immigration and Nationality Act of 1952, constituted a substantial compliance with the requirement of that section that such petitions be filed before the specified date.

3. The District Court erred in denying petitioners' petitions for naturalization in that the District Court failed to hold that periods of time in which several of the petitioners served within the continental United States under orders of the United States Military Sea Transportation Service, should be credited with sea time to satisfy the residence requirement of Section 330(a)(2) of the Immigration and Nationality Act of 1952.

4. The District Court erred in denying petitioners' petitions for naturalization in that the District Court rejected petitioners' evidence of their attempts to file petitions for naturalization before the time limit set forth in Section 330(a)(2) of the Immigration and Nationality Act of 1952.

5. The Findings of Fact and Conclusions of Law of the District Court are clearly erroneous because they are insufficient and are based upon an erroneous view of the law.

ARGUMENT.

I.

PETITIONERS' ELIGIBILITY FOR CITIZENSHIP UNDER THE NATIONALITY ACT OF 1940 WAS PRESERVED BY THE SAVINGS CLAUSE OF THE 1952 ACT.

The savings clause of the 1952 Act provides that statutes repealed by the 1952 Act are continued in force and effect as to certain matters enumerated in the savings clause, and that these matters are unaffected by anything in the 1952 Act "unless otherwise specifically provided therein." The enumeration of the matters which are saved by the savings clause falls into two groups which are divided by a semicolon. The first group includes the "validity of any declaration of intention, petition for naturalization . . . or other document or proceeding which shall be valid at the time this Act shall take effect;" while the second group includes "any prosecution, suit, action . . . civil or criminal, brought, or any status, condition, right in process of acquisition, act, thing, liability, obligation, or matter, civil or criminal, *done or existing at the time this Act shall take effect;*" (emphasis supplied). Thus it is clear that the first group includes certain documents and proceedings which are *valid* when the Act takes effect, but that the second group extends to all acts, things and matters which are merely *done or existing* at the time the Act takes effect. Congress imposed the requirement of validity as to the first group of matters saved, but eliminated this requirement as to the second group. As to any status, condition, right in process of acquisition, act, thing, or matter, it is not necessary that they be valid

immediately prior to the 1952 Act, but only that they be done or existing. The act of each appellant in completely or partially fulfilling the requirements for sea time as residence under the 1940 Act was an act, thing, matter, status, condition or right in process of acquisition done and existing at the time the 1952 Act took effect, and therefore this claim is saved to them.

Furthermore the savings clause clearly provides that as to these acts, things, matters, etc., the statutes repealed by the 1952 Act are continued in force and effect; thus the savings clause itself specifies what law is to govern these matters. The entire Nationality Act of 1940 was repealed by the 1952 Act, as shown above; therefore, Section 325(a) of the 1940 Act, under which these petitioners claim, is the law specified by the savings clause to govern the claims of these appellants.

There is no basis whatever in the savings clause for the view taken by the District Court that the savings clause extends only to things that were valid immediately prior to the enactment of the 1952 Act. The only test set forth in the savings clause is that the acts, things or matters be done before the 1952 Act took effect and that they gain legal significance from statutes which are repealed by the 1952 Act.

This construction of the savings clause has been adopted by numerous courts. In construing the savings clause of the 1940 Act, Section 347(a) of that Act, 8 U.S.C. §747(a), 1946 ed., which was the forerunner of the savings clause of the 1952 Act and is

substantially similar to it, the Court in the case of *In re Urmeneta*, D. Wis., 42 F. Supp. 138, 140, stated:

“Section 347(a) provides, in effect, that statutes . . . which are repealed by this Act shall not be affected thereby, but shall be continued in force and effect with respect to any thing, act, or matter existing at the time the said Act takes effect. Petitioner’s ‘Act’ in withdrawing his declaration of intention ‘existed’ at the time the Act went into effect.”

The *Urmeneta* case held that an alien who withdrew his declaration of intention at a time when this barred him from citizenship was not entitled to naturalization under the 1949 Act, even though the 1940 Act repealed that bar. Compare *Petition of Otness*, N.D. Cal., 49 F. Supp. 220. Similarly in *Benzian v. Godwin*, 2 Cir., 168 F. 2d 952, *cert. denied*, 335 U.S. 886, the Court held that an alien who applied for suspension from the Selective Service Act at a time when that action barred him from citizenship, was ineligible for naturalization although another statute had provided in the meantime that such an act would not bar an alien from citizenship. See also *Mannerfrid v. United States*, 2 Cir., 200 F. 2d 730, *cert. denied*, 345 U.S. 918. In *Savorgnan v. United States*, 7 Cir., 171 F. 2d 155, 158, the Court said this of the savings clause of the 1940 Act:

“This section provides that nothing in Chapters III or V of the Act, unless otherwise provided therein, shall be construed to affect ‘any act, * * * done or existing, at the time this Act shall take effect; but as to all such * * * acts, * * * the stat-

utes * * * repealed by this Act, are hereby continued in force and effect.' ”

“Section 2 of the Act of March 2, 1907, was specifically repealed by Section 504, Chapter V, of the 1940 statute. It would appear that becoming naturalized in a foreign state in conformity with its laws is an ‘act’ within the meaning of the above-quoted provisions of Section 347, and that, therefore, the provisions of Section 2 of the 1907 statute would continue to govern . . .”

Appellants’ contention as to the proper construction of the savings clause is squarely supported by the holding of the Second Circuit in *United States ex rel. Zacharias v. Shaughnessy*, 2 Cir., 221 F. 2d 578. In that case an alien had entered this country in 1951 and was admittedly deportable at all times. In August of 1952 he married an American citizen who filed an application for an immigration visa for her husband in September of 1952, so that he might legally enter this country from Canada. This application was later denied. In 1953 he was ordered deported and he then filed a request for voluntary deportation. This request was administratively denied on the ground that he had failed to establish good moral character as it is defined in the 1952 Act. His petition for a writ of habeas corpus presented the question of whether he should have his moral character judged by the standards of the 1952 Act, or whether he was entitled to have it judged according to the law in effect at the time his wife applied for an immigration visa for him. In stating and answering this question the Court said:

“Did the filing of the petition for issuance of an immigration visa by his American wife give

Zacharias 'any status, condition, right in process of acquisition, act, thing, liability, obligation, or matter, civil or criminal, done or existing,' at the time the 1952 Act went into effect? If so, under §405(a) of that legislation, 8 U.S.C. §1101 note, his case must be governed by prior statutes unless otherwise specifically provided . . . We conclude that the preliminary application for the visa in September, 1952, was sufficient to bring Zacharias within §405(a). *This application was the first step in his effort to attain a legal status in this country.* . . . Since we hold that Zacharias on December 24, 1952, had a status, condition, right in process of acquisition, act, thing, or matter then done or existing, this decision of the Board and its affirmance by the district court are in error unless some other specific provision of the 1952 Act takes this case out of the scope of §405(a). We find no such exception here. *It is true that the general deportability section, 8 U.S.C. §1251, is specifically made applicable to cases arising before enactment of the new statute;* but Zacharias does not contest his deportability. The relevant sections governing voluntary departure and defining good moral character, 8 U.S.C. §§1254(e) and 1101(f) (2), say nothing about retroactive application. This case, therefore, like *United States v. Menasche*, supra, should be governed by the pre-1952 law." (Emphasis supplied.)

221 F. 2d at 580-581.

The sole reason for the Court in the *Zacharias* case applying prior law to the matter there in issue, was that an act, thing or matter had been done before 1952 which was done or existing on December 24, 1952—an act which was the first step in attaining a legal status

in this country. The Court considered it irrelevant that at all times Zacharias was deportable. Obviously he had no "rights" and he was not eligible for anything when the 1952 Act took effect; the sole basis for saving prior law as to him was an act done prior to 1952. The position of the appellants here is much stronger than that of Zacharias, because prior to 1952 they had taken all of the steps necessary to entitle them to naturalization—not just the first step—and therefore under the *Zacharias* case, as well as the other cited cases, these appellants are entitled by the savings clause to have their acts governed by the law in effect at the time those acts took place.

II.

THE 1952 ACT DOES NOT "OTHERWISE SPECIFICALLY PROVIDE" FOR APPELLANTS.

The savings clause of the 1952 Act provides that nothing is saved by that clause if the 1952 Act "otherwise specifically provides therein" that it should not be saved. The Government contended below that Section 330(a)(2) of the 1952 Act otherwise specifically provides for petitioners. This section contains an affirmative grant of the rights sought by appellants here, as to all petitions for naturalization filed between December 24, 1952 and December 24, 1953, but it contains no language whatever stating that these rights are not to be granted as to petitions filed at other times, or that these rights are not to be saved by the savings clause of the 1952 Act. Respondent's position on this

point can only be sustained if a negative implication is to be read into Section 330(a)(2), and petitioners strongly contend that no such negative implication can be read into that section, and that the holding of *United States v. Menasche*, 348 U.S. 528, requires that no such negative implication be read into that section.

Section 330(a)(2) provides in substance that sea time earned before the 1950 Act, shall be deemed to satisfy the residence requirement of the 1952 Act if the seaman files his petition for naturalization within one year from the effective date of the 1952 Act (December 24, 1952). Obviously this section does not specifically provide that such sea time shall *not* be deemed to satisfy the residence requirement of the 1952 Act if the seaman files his petition more than one year after the effective date of the 1952 Act. Therefore, in no sense can it be said that this section "specifically provides" that petitioners are stripped of rights otherwise saved by the savings clause.

The Government contends that this section should be read to say something like the following:

"No sea time earned prior to the effective date of the 1952 Act can be deemed to satisfy the residence requirement of the 1952 Act if the seaman files a petition for naturalization more than one year after the effective date of the 1952 Act."

This would plainly constitute a judicial rewriting of the statute, and only by such a rewriting can the petitioners be said to be "otherwise provided for in the 1952 Act."

The holding in the *Menasche* case not only supports the position of appellants here, but actually presents a much stronger, holding, on its facts, than is required in the instant case. The holding in *Menasche* involved Section 405(b) of the 1952 Act, which reads as follows:

“Except as otherwise specifically provided in Title III, any petition for naturalization heretofore filed which may be pending at the time this Act shall take effect shall be heard and determined in accordance with the requirements of law in effect when such petition was filed.”

The Government contention in the *Menasche* case was that even if Menasche had rights which could be saved by Section 405(a), (which is the section under which appellants here claim), that Menasche was “otherwise specifically provided for” by Section 405(b), and therefore Menasche’s rights were not effectively saved. In this regard the Government urged that Section 405(b) should be read to contain a negative implication something like the following:

“No petition for naturalization filed after the effective date of this Act shall be heard and determined in accordance with the requirements of law in effect when such petition was filed.”

The Supreme Court held that Section 405(b) did not embody any such negative implication, and that therefore it did not specifically provide for Menasche. The Court said:

“As we read the statute, subsection (b) merely implements and emphasizes the operation of its forerunner. It is clear, first, that subsection (b) is not a specific exception to §405(a), since *both*

subsections state that prior law should apply in certain circumstances. The slight negative implication derived from the fact that §405(b) applies to *pending* petitions for naturalization, and not to those filed after the effective date of the new Act, is overcome by the broad sweep of §405(a) and its direction that prior law applies unless the Act ‘otherwise *specifically* provide[s].’ ” (Emphasis by the Court.)

348 U.S. 528, 536-537.

This holding is a plain bar to the interpretation urged by the Government here. A second holding of the *Menasche* case goes even further in rejecting the Government interpretation. After holding that Menasche’s rights were saved by Section 405(a) and were not denied by the slight negative implication in Section 405(b), the Supreme Court examined Section 316(a) of the 1952 Act, 8 U.S.C.A. §1427(a), which imposed the new physical presence requirement, to determine whether it “otherwise specifically provided” that the new Act should apply to Menasche. Section 316(a) provided that no person “unless otherwise provided in this Title,” shall be naturalized unless he had been physically within the United States for at least half of his five years of residence; Menasche was not able to meet that requirement. Section 316(a) was included in Title III of the Act, while the savings clause (Section 405(a)) was in Title IV; therefore the express negative of Section 316(a) barred Menasche on its face. Yet the Supreme Court held that this section did not “otherwise specifically provide” that Menasche’s rights within the savings clause were

not to be saved. Appellants here are not included in any express negative provision which would bar them from the benefits they seek; hence it is even more clear that they are not otherwise specifically provided for, than was the case with Menasche.

The Supreme Court held in effect in the *Menasche* case that rights saved by the savings clause are not lost unless other provisions in the 1952 Act specifically provide that they are to be lost, and that no negative implications can be considered a substitute for a specific provision.

It is also important to note that in the *Menasche* case the Supreme Court held that Section 405(b) did not "otherwise specifically provide" for Menasche, even though that section granted affirmatively, as to petitions filed earlier than Menasche had filed his petition, the relief sought by Menasche. This holding disposes of the contention that Section 330(a)(2) "otherwise specifically provides" for appellants because it grants the relief they seek, as to petitions filed earlier than they filed their petitions.

III.

THE FINDINGS OF THE LOWER COURT ARE ERRONEOUS AND ARE INSUFFICIENT TO SUPPORT THE ORDER DENYING THE PETITIONS.

Appellants first wish to point out that a reading of the findings of fact and conclusions of law entered by the lower Court, in light of the testimony received and the issues raised on the trial, plainly reveals that

they are inadequate for a proper determination of the legal issues on this appeal, and for that reason the cases should be sent back for retrial, or for amended findings at the very least. As the Court said in *Stasiukevich v. Nicolls*, 1 Cir., 168 F. 2d 474, 478, 480:

“On the record before us, this meager finding is insufficient to enable us to perform our appellate function intelligently.”

“In view of the generally sketchy and unsatisfactory character of the present record, we think that the case should be retried, instead of being sent back merely for more detailed findings.”

Appellants insisted at the trial, and urge here on appeal, that they attempted to file their petitions for citizenship at various times between 1950 and 1953 and were prevented from doing so by agents of the Immigration and Naturalization Service, and that as a matter of law, this constituted a substantial compliance with the requirements that the petitions be filed before certain dates.

Finding V of the findings of fact as to each petitioner recites that they did not attempt to file their petitions within the period prescribed by the 1952 Act, and finding VI as to petitioners Tano, Elizalde and Romano recites in addition that these petitioners “did not file a Petition for Naturalization prior to September 23, 1950.” Conclusions of law I and II recite that each of the petitioners has failed to establish compliance with Section 330(a)(2) of the 1952 Act and may not be naturalized under that Act.

The District Court emphatically stated his views as to the law on this point (Transcript, page 107):

“I can tell you now, . . . it doesn't make any difference what any officer of the government says about any statute. There is no case that has ever been called to my attention . . . by which the United States is ever estopped by the conduct of any officer as to the rights of a person who is required to take certain steps.”

Appellants contend that this view is in error as a matter of law. In *Moser v. United States*, 341 U.S. 41, the Supreme Court had before it a situation in which a Swiss alien had submitted an application to be exempted from the draft, and that application was sufficient to bar him from citizenship. But the evidence showed that he had submitted the application on the erroneous advice of the Swiss Legation that such an application would not bar him from applying for American citizenship. In holding that he was not barred from becoming a citizen under those circumstances, the Court said (341 U.S. at 47):

“There is no need to evaluate these circumstances on the basis of estoppel of the Government or the power of the Swiss Legation to bind the United States by its advice to petitioner. Petitioner did not knowingly, intentionally waive his rights to citizenship. In fact, because of the misleading circumstances of this case, he never had an opportunity to make an election between the diametrically opposed courses required as a matter of strict law.”

It was also stated as a general rule, after an extensive review of the authorities, in *United States v. Certain Parcels of Land*, S.D. Cal., 131 F. Supp. 65, 74:

“Briefly put, then, in cases where sovereign immunity to suit has been waived, the Government can be estopped by the conduct of its agents in the same circumstances as a private individual, partnership, or corporation.”

The record shows that the agents of the Immigration Service were clearly acting within the scope of their authority in advising petitioners, and others similarly situated, as to their eligibility for naturalization, and deciding whether or not to offer the petitioners a petition to file. Transcript, pages 115-120. The testimony of the petitioners also clearly reveals that the petitioners relied to their detriment upon the statements of the various clerks that their applications would be mailed to them (and they never were), or that they were ineligible for citizenship, or that they could not file their applications at that time. Petitioners urge this Court to hold that the Court below was in error as a matter of law, and that such evidence is sufficient in law to effect a filing of the petitions on the dates involved. These petitioners were not familiar with the laws and customs of this country, and had employed every reasonable means at their command to accomplish a filing of their petitions. The Government is bound by the acts of its agents; furthermore, since the appellants either thought they were filing, or that they were going to be allowed to file, at the first time they were able to do so, they never had an opportunity to choose between filing and not filing (because they were misled into thinking that they could not file, or that the papers to be filed would

be sent to them), and therefore they come within the rule of the *Moser* case, *supra*.

More important, the findings of fact to the effect that petitioners did not attempt to file are clearly erroneous and must be reversed. There is no evidence whatever to rebut their testimony that they asked for applications and were refused. Only two witnesses testified for the Government on this issue, Finnegan and Baldwin. Baldwin stated that he is an examining clerk, United States District Court. Transcript, page 121. Since all of the transactions took place at other offices, his testimony does not support the finding. Finnegan stated that he was an applications examiner for the Immigration and Naturalization Service at their offices at 630 Sansome Street, in San Francisco. He testified that if a seaman with four and one-half years of sea time asked for an application, he would offer the seaman an application "if he asked and insisted on it" and that "after I talked to him and found out he isn't eligible, *and he wouldn't take my advice*, I probably would give it to him." (Emphasis supplied; Transcript pages 118-119.) In answer to a question by the Court he stated that if someone comes in to inquire into their status and finds out they are not eligible, that usually ends the matter in "99 cases out of a hundred." (Transcript, page 119.) And when counsel for petitioners pointed out that two of the petitioners had testified that they had specifically requested petitions from Mr. Finnegan and that their requests had been denied, the Court answered with a statement that seems to sum up its approach to this testimony:

“I don’t think it is in the record. If it is in the way you say it is, I wouldn’t believe it. My examination of these men leads me to the view that the facts are the way they gave them to me in answer to the questions I put.” (Transcript, page 120.)

The definition of what constitutes a finding that is “clearly erroneous” has been laid down in the case of *United States v. Oregon Medical Society*, 343 U.S. 326, 339, as follows:

“... when, *although there is evidence to support it*, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.” (Emphasis supplied.)

This rule plainly contemplates that there must be *some* evidence in the record to support a finding, before it can possibly be sustained, and accordingly it has been held that findings are clearly erroneous when (1) not supported by substantial evidence, (2) contrary to a clear preponderance of the evidence, or (3) based on erroneous views of the law. *Magidson v. Duggan*, 8 Cir., 212 F. 2d 748, *cert. denied*, 348 U.S. 883, 922; *Western Cottonoil Co. v. Hodges*, 5 Cir., 218 F. 2d 658. No evidence whatever appears in the record to support the finding in each case that the petitioners did not attempt to file their petitions prior to 1953, and furthermore those findings were based on an erroneous view of the law, and hence are clearly erroneous within the meaning of Rule 52(a) of the Federal Rules of Civil Procedure, and must be set aside.

Likewise the Court below made a finding that four of the petitioners had earned less than five years of sea time prior to September 23, 1950, refusing to count time spent by these petitioners ashore in the United States when they were ordered in 1949 by the Government shipping agency by whom they were employed (MSTS) to stand by and await further orders to ship out. They were subject to recall at any time by the MSTS, and in fact they were later recalled by that agency and earned further sea time. During this time petitioner Magallanes actually worked as a civilian for the Government at Treasure Island. And in addition, petitioner Abella worked in the Philippine Islands as a clerk for the United States Maritime Commission. Petitioners were entitled to have this time included with the sea time earned by them, as a matter of law, and in refusing to so find, the Court below erred.

The types of service that will be counted toward the residence requirement of Section 325(a) of the 1940 Act has already been extended beyond the precise terms of that section. In *United States v. Camean*, 2 Cir., 174 F. 2d 151, the Court held that service aboard vessels other than those specifically set forth in the statute was to be counted in computing the time earned under that section. The test laid down by Judge Learned Hand in that case for determining what types of service will be counted is regarded as the authoritative test:

“Since we have to deal with a term which is not a word of art (in the case cited, ‘not foreign vessels’) and was apparently used in its colloquial

sense, it is especially proper to look to the purposes of the statute as a whole. These were apparently two, one of which was to allow a class of persons to become citizens, whose occupation prevents them from complying with the conditions imposed upon aliens in general: continuous residence in the United States. That condition is imposed because residence is regarded as a proving ground on which the alien's qualifications can be tried; and these are 'good moral character' and attachment 'to the principles of the Constitution'. Already in 1918 it was apparently recognized that service on shipboard would afford an equivalent opportunity for acquaintance with the alien, provided he served on 'documented' vessels, since he would be in one of the most intimate of occupational associations, a seaman among his shipmates. . . . *All that is important is that the alien's service shall expose him to a scrutiny which is the measurable equivalent of actual residence*; and as to that the holder of legal title is not relevant. Nor has that circumstance any greater relevance to the other purpose of Congress, which presumably was to secure citizen seamen to man our merchant marine in such numbers as the law required." (Emphasis supplied.)

174 F. 2d at 152-153.

In *Petition of Karadzas*, S.D. N.Y., 124 F. Supp. 25, this test was applied to time spent ashore in a Government school at New Orleans and certain time spent making voyages to and from the alien's ship, and it was held that such time should be counted under Section 330(a)(2) of the 1952 Act. The Court relied on the fact that "during the entire period, he was subject

to the control and discipline of the United States Government.” See also *Application of Aguirre*, S.D. N.Y., 90 F. Supp. 668. It is beyond question that the application of this rule in the present case would require the various times in issue to be counted under the statute. The petitioners spent these times actually residing in the United States so that they were exposed to a scrutiny which was not only “the measurable equivalent” of actual residence, but in fact was actual residence, and they so spent that time at the request of the Government shipping agency which recruited them for sea service with the promise that if they spent five years of such service, they could become naturalized. Furthermore, it would be absurd to apply this section, which permits sea time to be counted in lieu of the customary actual residence, so as to exclude the customary actual residence itself. Therefore these periods of time must be counted toward the residence requirement of the statute, and the petitioners have thus satisfied that requirement, by earning five years before September 23, 1950.

CONCLUSION.

Therefore appellants earnestly contend: (1) that their eligibility for citizenship under the Immigration Act of 1940 was preserved by the savings clause of the 1952 Act; (2) that the 1952 Act does not specifically provide anything to the contrary, and therefore the 1952 Act does not “otherwise specifically provide” for appellants; (3) that the first attempt of each peti-

tioner to file his petition for naturalization, which was thwarted by the arbitrary conduct of the Immigration and Naturalization clerk, constituted substantial compliance with the requirement that such petitions be filed before certain dates, because each petitioner did everything he could reasonably be expected to do toward filing his petition; (4) that time spent ashore in the United States under orders of the MSTs should be counted with sea time to satisfy the residence requirement of Section 330(a)(2) of the 1952 Act; and (5) that the findings of fact and conclusions of law of the lower Court are either insufficient or in conflict with the foregoing principles, and therefore the decision of the lower Court must be reversed.

Dated, San Francisco, California,

May 21, 1956.

Respectfully submitted,

JACK L. BURNAM,

Attorney for Appellants.

No. 15,009

IN THE

United States Court of Appeals
For the Ninth Circuit

In the Matter of the Application
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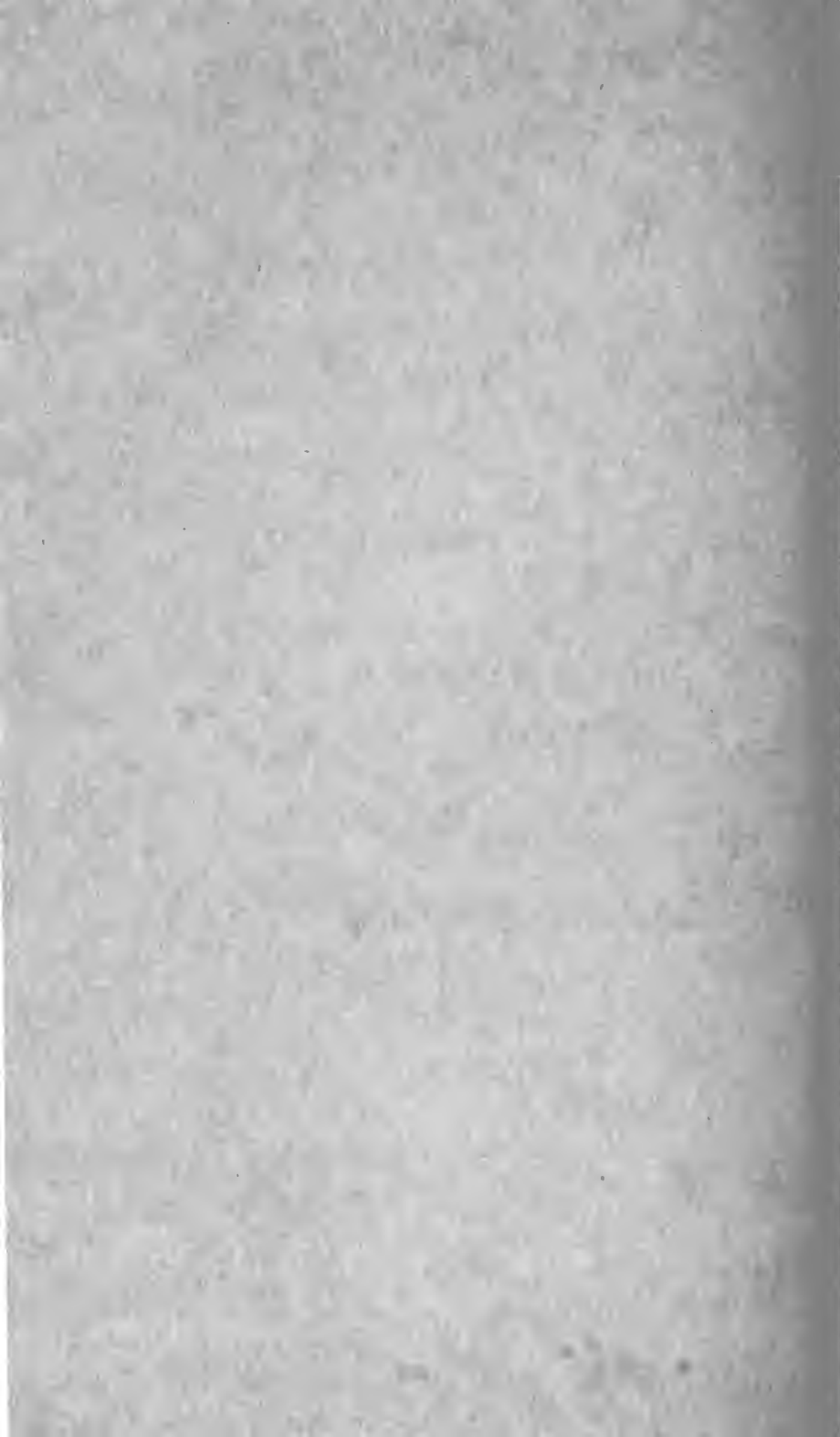
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**On Appeal from the United States District Court
for the Northern District of California.**

REPLY BRIEF OF THE UNITED STATES.

STATEMENT OF FACTS.

All of the appellants herein are natives of the Philippine Islands. None were ever admitted to the United States for permanent residence. All were employed by the United States on United States vessels through the Army Transport Service or its successor, the Military Sea Transport Service. On September 23, 1950 appellants Polintan, Magallanes, Martinez and Abella *had not* completed five years sea service, and appellants Tano, Elizalde and Romano *had* com-

pleted five years sea service. None of the appellants filed a petition for naturalization prior to September 23, 1955.

STATUTES.

Section 325 of the Nationality Act of 1940, 8 U.S.C. 725 (1942 edition), 54 Stat. 1150, as originally enacted, read as follows:

Sec. 325 (a) A person who has served honorably or with good conduct for an aggregate period of at least five years (1) on board of any vessel of the United States Government other than in the United States Navy, Marine Corps, or Coast Guard, or (2) on board vessels of more than twenty tons burden, whether or not documented under the laws of the United States, and whether public or private, which are not foreign vessels, and whose home port is in the United States, may be naturalized without having resided, continuously immediately preceding the date of filing such person's petition, in the United States for at least five years, and in the State in which the petition for naturalization is filed for at least six months, if such petition is filed while the petitioner is still in the service on a reenlistment, reappointment, or reshipment, or within six months after an honorable discharge or separation therefrom.

(b) The provisions of subsections (b), (c), (d), and (e) of section 324 shall apply to petitions for naturalization filed under this section, except that service with good conduct on vessels

described in subsection (a)(2) of this section may be proved by certificates from the masters of such vessels.

Section 325 of the Nationality Act as amended September 23, 1950, 8 U.S.C. 725 (1946 edition) 64 Stat. 1015 reads as follows:

Sec. 325 (a) Any periods of time during all of which an alien who was previously lawfully admitted for permanent residence has served honorably or with good conduct, in any capacity other than as a member of the armed forces of the United States (1) on board a vessel operated by the United States, or an agency thereof, the full legal and equitable title to which is in the United States; or (2) on board a vessel whose home port is in the United States, and (A) which is registered under the laws of the United States, or (B) the full legal and equitable title to which is in a citizen of the United States, or a corporation organized under the laws of any of the several States of the United States, shall be deemed residence within the United States within the meaning of Section 307 (a) of this Act, if such service occurred within five years immediately preceding the date such alien shall file a petition for naturalization. Service with good conduct on vessels described in clause (1) of this subsection shall be proved by duly authenticated copies of the records of the executive departments or agency having custody of the records of such service. Service with good conduct on vessels described in clause (2) of this subsection may be proved by certificates from the masters of such vessels.

(b) Any alien who (1) was excepted from certain requirements of the naturalization laws under the provisions of this section prior to this amendment, and (2) has filed a petition for naturalization under this section prior to the date of approval of this amendment may, if such petition is pending on the date of approval of this section as amended, be naturalized upon compliance with the applicable provisions of the naturalization laws in effect upon the date such petition was filed.

Section 330 (a) (2) and (b) of the Immigration and Nationality Act of 1952, 66 Stat. 251, 8 U.S.C. 1441, reads as follows:

Section 330(a) (1). * * *

Section 330(a) (2). For the purposes of this subsection, any periods of time prior to September 23, 1950, during all of which any person had served honorably or with good conduct for an aggregate period of five years on any vessel described in Section 325(a) of the Nationality Act of 1940 prior to its amendment by the Act of September 23, 1950, shall be deemed residence and physical presence within the United States within the meaning of Section 316(a) of this title, if such petition is filed within one year from the effective date of this Act. Notwithstanding the provisions of Section 318, a person entitled to claim the exemptions contained in this paragraph shall not be required to establish a lawful admission for permanent residence.

* * * * *

(b) Any person who was excepted from certain requirements of the naturalization laws under sec-

tion 325 of the Nationality Act of 1940 prior to its amendment by the Act of September 23, 1950, and had filed a petition for naturalization under section 325 of the Nationality Act of 1940, may, if such petition was pending on September 23, 1950, and is still pending on the effective date of this Act, be naturalized upon compliance with the applicable provisions of the naturalization laws in effect upon the date such petition was filed: Provided, That any such person shall be subject to the provisions of section 313 and to those provisions of section 318 which relate to the prohibition against the naturalization of a person against whom there is outstanding a final finding of deportability pursuant to a warrant of arrest issued under the provisions of this or any other Act, or which relate to the prohibition against the final hearing on a petition for naturalization if there is pending against the petitioner a deportation proceeding pursuant to a warrant of arrest issued under the provisions of this or any other Act.

Section 405 of the Immigration and Nationality Act of 1952 (8 U.S.C. 1101, Historical Note) 66 Stat. 280 reads as follows:

Sec. 405. (a) Nothing contained in this Act, unless otherwise specifically provided therein, shall be construed to affect the validity of any declaration of intention, petition for naturalization, certificate of naturalization, certificate of citizenship, warrant of arrest, order or warrant of deportation, order of exclusion, or other document of proceeding which shall be valid at the time this Act shall take effect; or to affect any

prosecution, suit, action, or proceedings, civil or criminal, brought, or any status, condition, right in process of acquisition, act, thing, liability, obligation, or matter, civil or criminal, done or existing, at the time this Act shall take effect; but as to all such prosecutions, suits, actions, proceedings, statutes, conditions, rights, acts, things, liabilities, obligations, or matters the statutes or parts of statutes repealed by this Act are, unless otherwise specifically provided therein, hereby continued in force and effect. When an immigrant, in possession of an unexpired immigrant visa issued prior to the effective date of this Act, makes application for admission, his admissibility shall be determined under the provisions of law in effect on the date of the issuance of such visa. An application for suspension of deportation under section 19 of the Immigration Act of 1917, as amended, or for adjustment of status under section 4 of the Displaced Persons Act of 1948, as amended, which is pending on the date of enactment of this Act, shall be regarded as a proceeding within the meaning of this subsection.

(b) Except as otherwise specifically provided in title III, any petition for naturalization heretofore filed which may be pending at the time this Act shall take effect shall be heard and determined in accordance with the requirements of law in effect when such petition was filed.

(c) * * *

QUESTIONS PRESENTED.

From the Specification of Errors appellants raise the following questions:

(1) Did each of appellants have a status, condition or right in process of acquisition at the time the Immigration and Nationality Act of 1952 went into effect December 24, 1952 which was preserved to them by Section 405(a) of the Act.

(2) May the performance of shoreside service in the case of appellants Polintan, Magallanes, Martinez and Abella be credited as sea service.

ARGUMENT.

I.

THE SAVINGS CLAUSE OF THE IMMIGRATION AND NATIONALITY ACT DOES NOT APPLY BECAUSE THE PETITIONERS HAD NO STATUS, CONDITION OR RIGHTS AT THE TIME THE ACT BECAME EFFECTIVE.

In the Nationality Act of 1940 Congress included Sec. 325(a) (8 U.S.C. 725(a), 1942 ed.) which permitted seamen to substitute five years service on American vessels for the five years residence in the United States required for naturalization under Sec. 307 (8 U.S.C. 707). Sec. 325 remained in effect until 1950 when it was amended by Sec. 26 of the Internal Security Act of 1950, Title 8 U.S.C. 725, 1946 ed., Supplement IV to provide that only seamen who had *first been admitted* to the United States *for permanent residence* could substitute sea service on Amer-

ican vessels for residence within the United States. This provision was retained in the Immigration and Nationality Act of 1952, Sec. 330(a)(1), Title 8 U.S.C. 1441(a)(1), but a special provision was added, Sec. 330(a)(2), permitting those seamen having an aggregate of five years of sea service before September 23, 1950 to use that time to satisfy the residence requirement for naturalization, *provided* "such petition is filed within one year from the effective date of this Act." (December 24, 1952.) Appellants failed to file their petitions within the period from December 24, 1952 to December 24, 1953. They seek to avoid the failure to satisfy the condition of the statute by invoking the Savings Clause, Sec. 405(a) of the 1952 Act.

Section 405(a) of the Immigration and Nationality Act of 1952, Title 8 U.S.C. §1101, 1953 ed., provides that "Nothing contained in this Act, unless otherwise specifically provided therein, shall be construed . . . to affect . . . any status . . . existing at the time this Act shall take effect."

This provision cannot be invoked by appellants because §330(a)(2) of the 1952 Act specifically provides otherwise and was meant by Congress to be exclusive. If the Savings Clause was meant to apply, there would have been no reason to insert the time limitation of one year. Congress certainly did not intend that those who were eligible under Section 330(a)(2), but who failed to file their petitions within the time allotted, could file them at any time under the Savings Clause.

Moreover, the Savings Clause "saves" only those rights existing at the time of its passage as stated above. Appellants had no rights or "status" which the Savings Clause could "save" at the time the Immigration and Nationality Act was passed in 1952. Congress in 1950 had imposed the additional requirement of lawful entry for permanent residence in the United States before sea service could be used as a substitute for the residence requirement. This change was not made without due consideration. In the Report of the Judiciary Committee, 82nd Congress, First Session (1951), page 705, it is stated:

"The consensus is that this is one of the weak spots in our nationality law and one which is most subject to abuse and fraud . . . There is abundant evidence to support the statement that the liberal provisions of Section 325 (of the 1940 Act) encourage ship jumping and put a premium on illegal entry as a prerequisite for naturalization."

Appellants were not eligible for naturalization during the period from September 23, 1950 to December 24, 1952. By the enactment of Section 330 (a)(2) Congress extended to those persons who had completed five years of service on American vessels prior to September 23, 1950 the opportunity within one year after December 24, 1952 to file petitions for naturalization based on such service. Congress thereby restored them to eligibility for the period of one year. There is provision for no alternative to filing the petition within the year.

The language of the Savings Clause is very broad but it is apparent that the intention was to preserve those rights or privileges which had accrued and could have been pursued but for the enactment of the Immigration and Nationality Act. Neither *United States v. Menasche*, 348 U.S. 528 (1955) nor *Zacharias v. Shaughnessy*, 221 F.2d 578 (2d Cir. 1955) are applicable to support appellants' contention that the Savings Clause should apply, since in both cases the petitioners had an existing legal status at the time the 1952 Act was passed; in fact, in the *Menasche* case, the petitioner had filed a declaration of intention to become an American citizen, the validity of which is expressly preserved by Section 405(a). In each of these cases, but for the Act, the relief sought could have been granted; therefore the Savings Clause applied. In the instant cases, the appellants were not eligible for naturalization between September 23, 1950 and December 24, 1952, and did not lose any rights or privileges by reason of the enactment of the Immigration and Nationality Act of 1952.

The essence of appellants' contention here is not to preserve a right or privilege but to create one.

More pertinent to the instant case is *Shomberg v. United States*, 348 U.S. 540 (1955), decided by the Supreme Court at the same time as the *Menasche* case. The *Shomberg* case was concerned with Section 318 of the 1952 Act, 8 U.S.C. §1429, 1953 ed., which states that "no petition for naturalization shall be finally heard . . . if there is pending against the petitioner a deportation proceeding". The petitioner

contended that the Savings Clause Sec. 405 preserved his eligibility for citizenship under prior law. The Court held "That Sec. 318 specifically excepts rights under the prior law from the protection of Sec. 405 when these rights stem from a petition for naturalization or from some other step in the naturalization process."

The Court also said, page 546:

"Only where something in the new law introduces a change, thereby affecting one's status under the old law, is the savings clause called into play."

Appellants' eligibility for naturalization under Sec. 325 of the Nationality Act of 1940 was terminated by the 1950 amendment. On appellants' contention there is no distinguishing reason why eligibility acquired under a still earlier statute, long since amended or repealed, should not also be considered as "preserved" by the Savings Clause of the 1952 Act. Under the law prior to 1941, for example, seamen had only to serve three years to satisfy their residence requirement. To contend that seamen who served three years prior to 1941 should be able to assert their status under the law at that time by applying the Savings Clause of the 1952 Act would be absurd.

Appellants' argument that the Nationality Act of 1940 was repealed in its entirety by the Immigration and Nationality Act of 1952 and therefore rights which had accrued under Sec. 325 of the Act as originally enacted were preserved overlooks the fact that Sec. 325 had been amended in 1950 to require

lawful entry for permanent residence as a condition to eligibility for naturalization. The 1952 Act continued the requirement of lawful entry for permanent residence, but added a waiver for one year only within which the petition could be filed.

II.

THE FAILURE OF APPELLANTS TO FILE PETITIONS FOR NATURALIZATION BETWEEN DECEMBER 24, 1952 AND DECEMBER 24, 1953, PRECLUDES THEM FROM NATURALIZATION UNDER THE IMMIGRATION AND NATIONALITY ACT.

All of the appellants admittedly filed petitions for naturalization subsequent to December 24, 1953. The Court below has found as a fact that appellants failed to file a petition for naturalization within one year after December 24, 1952. Appellants contended below and contend here that something less than *filing* a petition will satisfy the express requirement of Sec. 330(a)(2), “. . . if such petition is filed within one year from the effective date of this Act.” Appellants have cited no authority to support such a contention. The Court below has found it not to be true that appellants attempted to file a petition. This finding is abundantly supported by the record.

Rule 52(a) of the Federal Rules of Civil Procedure, Title 23 U.S.C., 1950 ed., provides that “In all actions tried upon the facts without a jury . . . findings of fact shall not be set aside unless clearly erroneous.”

United States v. Gypsum Co., 333 U.S. 395.

Regardless of the finding of the Court below as to the absence of "attempt" it is the position of appellee that the statute affords no alternative to the filing of the petition. The language of the statute is clear, the one essential act necessary to obtain the benefit of the waiver of the requirement of lawful entry for permanent residence and to substitute the five years sea service is to *file the petition* within the one year subsequent to the effective date of the 1952 Act, December 24, 1952.

III.

THOSE PETITIONERS WHO DID NOT SERVE FOR FIVE YEARS ON VESSELS DID NOT MEET THE REQUIREMENTS OF SECTION 325 OF THE NATIONALITY ACT OF 1940 PRIOR TO ITS AMENDMENT ON SEPTEMBER 23, 1950 AND THEREFORE ARE NOT ELIGIBLE FOR NATURALIZATION.

Assuming appellants Polintan, Magallanes, Martinez and Abella filed petitions for naturalization within the one year after December 24, 1952, they are not eligible for naturalization in that they do not have five years service on board any vessel within the meaning of Sec. 330(a)(2) of the 1952 Act.

Sec. 330(a)(2) requires service "honorably or with good conduct for an aggregate period of five years on any vessel described in Sec. 325(a) of the Nationality Act of 1940." Section 325 of the Nationality Act of 1940 as originally enacted, provided that "a person who has served honorably or with good conduct for an aggregate period of at least five years

(1) on board of any vessel . . . or (2) on board vessels . . .” This language could hardly be clearer but it is made so by the incorporation of subsections (c) and (d), among others, of Sec. 324 (8 U.S.C. 724). Reading both sections together, as they were intended to be, a petitioner will prove five years of sea service by the certificate of the master of the vessels on which he served, or by other competent evidence. Assuming his service was not continuous, then he proves his residence, character and attachment to the Constitution during the periods between his service by the testimony of witnesses. To hold that a seaman was not required to serve five years on board vessels would not only do violence to the language of the section but would defeat its purpose, namely, to obtain qualified persons to man the ships. Employment on shore in the Philippine Islands as a clerk for the United States Maritime Commission or at Treasure Island, in the Officers’ Mess, is not employment on board vessels.

The matter is discussed in the Joint Hearings before the Subcommittee on the Judiciary, Congress of the United States, 82nd Congress, First Session (1951) at page 544 et seq. See also Hearings Before the Committee on Immigration and Naturalization, House of Representatives, 76th Congress, First Session, at page 108 et seq. for a consideration of the section prior to its enactment as part of the Nationality Act of 1940.

CONCLUSION.

In conclusion it may be said that the petitioners' eligibility for naturalization was restored when the Immigration and Nationality Act of 1952 went into effect and they were allowed the period of one year from December 24, 1952 within which to file petitions for naturalization. On December 25, 1953 their eligibility under Sec. 330(a)(2) of the Act had ceased. The decision of the Court below denying the petition should be affirmed.

Dated, San Francisco, California,
July 30, 1956.

Respectfully submitted,

LLOYD H. BURKE,

United States Attorney,

CHARLES ELMER COLLETT,

Assistant United States Attorney,

Attorneys for Appellee.

No. 15,009

IN THE

United States Court of Appeals
For the Ninth Circuit

In the Matter of Application for
Citizenship of:

ALEJO TRABOCO TANO, et al.,

Appellants,

VS.

UNITED STATES IMMIGRATION AND NAT-
URALIZATION DEPARTMENT,

Respondent.

APPELLANTS' CLOSING BRIEF.

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FILED

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Respondent.

APPELLANTS' CLOSING BRIEF.

Respondent's reply brief is limited to mere assertions that appellants' position is "obviously" in error, without citation of any authority to illustrate this supposedly obvious error. Respondent's reply brief cites only four cases; two of those cases were cited by appellants in support of contentions made in appellants' opening brief; the third of respondent's four cases is cited to support the text of the Federal Rules of Civil Procedure; and the fourth case, which is the only case cited in support of affirmance of the court below, is of no real help on the issues, as appellants will show.

Respondent's first argument, presented on pages 9 to 12 of respondent's reply brief, is that the savings clause of the 1952 Act does not apply to appellants because (according to respondent) they had no status, condition or rights at the time the 1952 Act took effect. This entire argument is irrelevant and of no consequence because it overlooks the fact that the savings clause of the 1952 Act preserves many things in addition to rights, conditions, and a status: the clause also provides that the 1952 Act shall not affect any "right in process of acquisition, act, thing . . . or matter . . . done or existing, at the time this Act shall take effect . . ."

Appellants rely on this entire provision and particularly contend that the act of each appellant in acquiring sea time in complete or partial fulfillment of the residence requirements of the 1940 Act, was an act, thing or matter which was done and existing at the time the 1952 Act took effect.

At page 10 of respondent's reply brief the bald statement is made that "it is apparent" that the savings clause of the 1952 Act only extends to privileges that could have been pursued but for the enactment of the 1952 Act. No authority is cited for this assertion, and in fact none can be cited. Quite the contrary is true. As discussed at pages 7 and 8 of appellants' opening brief, it is only necessary that acts, things or matters have been *done or existing* at the time the 1952 Act took effect—no requirement of validity is imposed, and no requirement is made that such acts,

things or matters should have been pursuable but for the enactment of the 1952 Act.

The statement is also found at page 10 of respondent's reply brief that "Neither *United States v. Menasche*, 348 U.S. 528 (1955) nor *Zacharias v. Shaughnessy*, 221 F.2d 578 (2d Cir. 1955) are applicable . . . since in both cases the petitioners had an existing legal status at the time the 1952 Act was passed . . ." But the plain facts of those cases demonstrate the complete invalidity of the quoted statement.

In the *Zacharias* case the only things that had occurred prior to the effective date of the 1952 Act were that the alien had entered this country illegally, and his wife had filed an application for an immigration visa for him which was later denied. He admitted that he was at all times deportable. Therefore it is misleading for the respondent to state that Zacharias had "an existing legal status," since that infers that he had some sort of enforceable rights, when in fact he was not eligible for anything (except deportation) when the 1952 Act took effect.

In the *Menasche* case the alien had filed a declaration of intention before 1952, but his petition for naturalization was not filed until after the 1952 Act took effect. The United States there contended that the petition was governed exclusively by Section 405(b) of the 1952 Act, and that this section and Section 316(a) of the 1952 Act 'otherwise specifically provided' for Menasche. Respondent makes the same contention here (on page 8 of respondent's reply brief),

claiming that Section 330(a)(2) of the 1952 Act otherwise specifically provides for appellants. The Supreme Court rejected these contentions in the *Menasche* case (see pages 12 to 16 of appellants' opening brief), and respondent's contention here is similarly groundless. Moreover it should be noted that the court below entered no findings as to whether any section of the 1952 Act otherwise specifically provides for appellants.

At page 10 of respondent's reply brief the assertion is made that *Shomberg v. United States*, 348 U.S. 540, is "more pertinent to the instant case." But the *Shomberg* case is readily distinguishable from the case at bar. That case turned upon an interpretation of Section 318 of the 1952 Act, and Section 318 played a role in the *Shomberg* case analogous to Section 330(a)(2) in the case at bar. Here respondent claims that Section 330(a)(2) provides something contrary to the savings clause of the 1952 Act. Respondent, in quoting the provisions of Section 318 (at page 10 of respondent's reply brief) conveniently omitted the language upon which the Supreme Court relied most heavily, and which distinguishes that section from Section 330(a)(2) which is involved here; the distinguishing language of Section 318 is:

"Notwithstanding the provisions of section 405(b) . . ."

This language is couched in express negative terms which are not to be found in Section 330(a)(2). Therefore the holding of the *Shomberg* case amounts to no more than a holding that if the Act expressly

denies the benefit of a specific provision of prior law to a petitioner, then that benefit is not available to him under a general savings clause. There is no provision of the 1952 Act which expressly denies appellants the benefits of prior law, as was the case in *Shomberg v. United States*, and therefore *Shomberg* is inapplicable here.

Appellants Tano, Elizalde and Romano contend that having earned five years service at sea, at a time when that service fulfilled the residence requirement then in effect, that fulfillment of the residence requirement is a status, condition and right in process of acquisition, and is an act, thing and matter which was done and is existing, and therefore the prior law is applicable to it under the savings clause of the 1952 Act. Appellants Polintan, Magallanes, Martinez and Abella have also fulfilled that residence requirement if their sea time is computed according to the authorities set forth at pages 22 to 24 of appellants' opening brief. To make the bald statement (found at page 14 of respondent's reply brief) that the computation of sea time according to appellants' theory does violence to the language and purpose of the statute, is to disregard those authorities. It also ignores the facts of this case, inasmuch as the time which the latter four appellants seek to count toward the residence requirement was spent as directed by the Government shipping agency that employed them (MSTS). Similarly the statement at page 9 of respondent's reply brief that the requirements of the former section "encourage ship jumping and put a premium on illegal

entry” is inapposite because appellants did *not* jump ship, but obediently did as they were told to do by the Government agency that employed them. It is more appropriate to say that if these appellants are denied naturalization, the clear language and purpose of these statutes will have failed, because these appellants were recruited to—and did—man the merchant ships of this country with the promise of citizenship; and they have faithfully obeyed all orders given to them.

The only reason for delay in the filing of appellants’ petitions for naturalization is that they relied on the statements of employees of the Immigration Service after appellants had taken all reasonable steps at their command to insure compliance with the law.

Lastly it should be noted that respondent states at page 11 of respondent’s reply brief: “On appellants’ contention there is no distinguishing reason why eligibility acquired under a still earlier statute, long since amended or repealed, should not also be considered as ‘preserved’ by the Savings Clause of the 1952 Act.” Whatever the relative merits of the latter contention, the short answer to respondent’s criticism of it is that appellants do not make such a contention. The more complete answer to this contention is that appellants’ rights accrued under the 1940 Act; the savings clause of the 1952 Act expressly applies to statutes repealed by the 1952 Act; and Section 403(43) of the 1952 Act specifically provides for the repeal of the entire 1940 Act. Therefore appellants’ eligibility under the 1940 Act was preserved by the savings clause of the 1952 Act.

CONCLUSION.

It is respectfully submitted that the decision of the District Court must be reversed and remanded with directions either to grant the petitions for naturalization or to enter sufficient findings of fact and conclusions of law.

Dated, San Francisco California,
October 1, 1956.

Respectfully submitted,
JACK L. BURNAM,
Attorney for Appellants.



No. 15010

United States
Court of Appeals
for the Ninth Circuit

CLIFFORD O. BOREN, DELTA M. BOREN and
CLIFFORD O. BOREN CONTRACTING CO.,
INC., Appellants,

vs.

LLOYD M. TUCKER, Special Agent, Internal
Revenue Service, Appellee.

Transcript of Record

Appeal from the United States District Court for the Southern
District of California, Southern Division

FILED

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No. 15010

United States
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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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* Page numbers appearing at foot of page of original Transcript of Record.



In the United States District Court for the Southern District of California, Southern Division

Civil No. 1780-SD

LLOYD M. TUCKER, Special Agent, Internal
Revenue Service, Petitioner,

VS.

CLIFFORD O. BOREN CONTRACTING CO.,
INC., a California corporation, CLIFFORD O.
BOREN, President, CLIFFORD O. BOREN
CONTRACTING CO., INC.; and DELTA M.
BOREN, Vice - President, CLIFFORD O.
BOREN CONTRACTING CO., INC.,
Respondents.

**PETITION FOR ORDERS OF ATTACHMENT
OF PERSON FOR CIVIL CONTEMPT**
(Internal Revenue Code of 1954, Section 7604)

Your petitioner, Lloyd M. Tucker, Special Agent, Internal Revenue Service, respectfully represents as follows:

I.

This action arises and jurisdiction is granted this Court under the provisions of the Internal Revenue Code of 1954, 68A Stat., Sections 7402, 7602, 7603, 7604, 7605; Federal Rules of Civil Procedure 64, 81(a)(3); and Title 28 United States Code, Sections 1340 and 1345.

II.

That petitioner is a duly appointed and acting Special Agent of the Internal Revenue Service and has been authorized by the Secretary of the Treas-

ury to perform the duties of such office and, specifically, the duties referred to in Sections 7603 and 7604 of the Internal Revenue Code, 1954. [2]

III.

At all times herein mentioned the Internal Revenue tax liability of Clifford O. Boren and Delta M. Boren for the calendar years 1950 and 1951 was, and is, under inquiry and determination by the Internal Revenue Service; your petitioner has reasonable cause to believe that said taxpayers may have filed false or fraudulent returns with intent to evade the tax or may have wilfully attempted to defeat or evade the taxes imposed by the Internal Revenue Code.

IV.

The respondent Clifford O. Boren Contracting Co., Inc., is a corporation duly organized and existing under the laws of the State of California and has its principal office in the City of San Diego, California.

V.

Respondent Clifford O. Boren Contracting Co., Inc., or respondent Clifford O. Boren, its President, or respondent Delta M. Boren, its Vice-President, in their capacities as such, has possession, care, and custody of certain books, records, papers and data hereinafter set forth; said books, records, papers and data contain therein entries relating to the business of the aforesaid Clifford O. Boren and Delta M. Boren; said books, records, papers and data are material and relevant to said inquiry.

VI.

Said books, records, papers and data are as follows: General Journal, Cash Journal, General Ledger, Payroll Records and Payroll Checks bearing the endorsement of any of the following named persons: Clifford O. Boren, Delta M. Boren, Marjorie H. Bell, Betty K. McCarthy, and the Clifford O. Boren Contracting Company, Inc., for the period from July 1, 1951 to December 31, 1951.

VII.

On August 25, 1955, summonses were issued by petitioner to the respondents Clifford O. Boren Contracting Co., Inc., to Clifford O. Boren as President of Clifford O. Boren Contracting Co., Inc., and to Delta M. Boren as Vice-President of Clifford O. Boren Contracting Co., Inc., to appear before petitioner at 3755 Sixth Avenue, San Diego, California, on September 6, 1955, at 10:00 a.m., and there to testify and to produce among other documents said books, records, [3] papers and data. True and correct copies of each of said summonses are attached hereto as Exhibits "A," "B," and "C", respectively, and incorporated herein by reference as though set forth in full.

VIII.

On August 25, 1955, at San Diego, California, summonses issued to Clifford O. Boren Contracting Co., Inc., and Clifford O. Boren, President, Clifford O. Boren Contracting Co., Inc., were personally served by delivering in hand to Clifford O. Boren

attested copies thereof; on August 25, 1955, at San Diego, California, the summons issued to Delta M. Boren, Vice-President, Clifford O. Boren Contracting Co., Inc., was served by leaving an attested copy with one Thelma Wertheimer, housekeeper for Delta M. Boren, at 4511 Utah Street, San Diego, California, the last and usual place of abode of Delta M. Boren.

IX.

Respondents Clifford O. Boren, President of the Clifford O. Boren Contracting Co., Inc., and Delta M. Boren, Vice-President of the Clifford O. Boren Contracting Co., Inc., reside in San Diego County within the Southern District of California.

X.

At the time and place set for hearing in the summonses served upon said respondents, there appeared Delta M. Boren, Clifford O. Boren, and John A. Brant, their attorney. Attached hereto and marked Exhibit "D", is a complete, true and correct copy of reporter's transcript of all the proceedings that then took place on September 6, 1955, at 3755 Sixth Avenue, San Diego, California, in the presence of petitioner and respondents.

XI.

Respondents Delta M. Boren as Vice-President of the Clifford O. Boren Contracting Co., Inc., and Clifford O. Boren as President of the Clifford O. Boren Contracting Co., Inc., and the Clifford O. Boren Contracting Co., Inc., did each wilfully and

knowingly neglect and refuse to obey said summonses as [4] required in that said respondents did appear at the time and place set forth in the summonses but did not produce said books, records, papers and data.

Wherefore, your petitioner prays:

(1) That an attachment be issued against said Clifford O. Boren, President, Clifford O. Boren Contracting Co., Inc., and against Delta M. Boren, Vice-President, Clifford O. Boren Contracting Co., Inc., as for a contempt directed to the United States Marshal or his deputies, for the arrest of said Clifford O. Boren and Delta M. Boren, and that an order be issued therefor, or that in lieu thereof, said Delta M. Boren and Clifford O. Boren be ordered to show cause, if any there be, why an attachment should not be issued against them as for a contempt and why they should not be compelled to answer petitioner's questions and to produce said books, records, papers and data, and, further, why they should not be held in civil contempt.

(2) That if satisfactory proof be made, and no sufficient showing to the contrary shall appear, that this Court issue an attachment providing for the arrest of said Delta M. Boren and Clifford O. Boren, and compel said Clifford O. Boren and Delta M. Boren in their capacities as President and Vice-President, respectively, of Clifford O. Boren Contracting Co., Inc., to answer petitioner's questions and to produce said books, records, papers and data,

and for failure thereof to hold said Clifford O. Boren, Delta M. Boren and Clifford O. Boren Contracting Co., Inc., in civil contempt.

(3) That such further orders be made consistent with the law for the punishment of civil contempt, to enforce obedience to the requirement of said summonses as may be necessary in the circumstances.

(4) For such other and further relief as to the Court may seem just and proper.

LAUGHLIN E. WATERS,

United States Attorney

EDWARD R. McHALE,

Asst. U. S. Attorney, Chief, Tax
Division

ROBERT H. WYSHAK and

BRUCE I. HOCHMAN,

HARRY D. STEWARD and

HOWARD HARRIS,

Asst. U. S. Attorneys,

/s/ By EDWARD R. McHALE,

Attorneys for Petitioner

[5]

Duly Verified. [6]

Petitioner's Exhibit No. 1.

[Endorsed]: Filed September 19, 1955.

[Title of District Court and Cause.]

ORDER TO SHOW CAUSE

Upon reading and considering petition of Lloyd M. Tucker, Special Agent, Internal Revenue Service, and good cause appearing therefor,

It Is Hereby Ordered that Clifford O. Boren, President, Clifford O. Boren Contracting Co., Inc., respondent, appear before this Court on the 24th day of October, 1955, at 10 o'clock a.m., or as soon thereafter as counsel may be heard, to show cause, if any there be, why an attachment should not issue against him as for a contempt and why he should not be compelled to answer petitioner's questions and produce books, records, papers and data referred to in said petition, and further why he should not be held in civil contempt.

It is further ordered that a certified copy of the petition and a certified copy of this order be served on said Clifford O. Boren by the United States Marshal within 10 days, after date hereof, and that such service shall be deemed to be sufficient for due notice.

Dated: This 19 day of September, 1955.

/s/ HARRY C. WESTOVER,

U. S. District Judge [17]

[Endorsed]: Filed September 19, 1955.

[Title of District Court and Cause.]

ORDER TO SHOW CAUSE

Upon reading and considering petition of Lloyd M. Tucker, Special Agent, Internal Revenue Service, and good cause appearing therefor,

It Is Hereby Ordered that Delta M. Boren, Vice-President, Clifford O. Boren Contracting Co., Inc., respondent, appear before this Court on the 24th day of October, 1955, at 10 o'clock a.m., or as soon thereafter as counsel may be heard, to show cause, if any there be, why an attachment should not issue against her as for a contempt and why she should not be compelled to answer petitioner's questions and produce books, records, papers and data referred to in said petition, and further why she should not be held in civil contempt.

It is further ordered that a certified copy of the petition and a certified copy of this order be served on said Delta M. Boren by the United States Marshal within 10 days, after date hereof, and that such service shall be deemed to be sufficient for due notice.

Dated: This 19th day of September, 1955.

/s/ HARRY C. WESTOVER,

U. S. District Judge [18]

[Endorsed]: Filed September 19, 1955.

[Title of District Court and Cause.]

AFFIDAVIT OF LLOYD M. TUCKER IN OP-
POSITION TO PLAINTIFFS' MOTION
FOR PRELIMINARY INJUNCTION

United States of America,
Southern District of California,
Central Division—ss.

Lloyd M. Tucker, being first duly sworn, deposes
and says:

That affiant is now and has been for the last nine
years a Special Agent of the Internal Revenue
Service and for the four years last past has been
assigned to the San Diego Office of the Internal
Revenue Service. That his duties primarily concern
the investigation of alleged evasions of income taxes
and matters related thereto in the enforcement of
the Internal Revenue laws.

That he was assigned to the investigation of the
tax liability of Clifford O. Boren and Delta M.
Boren for the years 1950 and 1951. That he com-
menced his examination on October 20, 1954, and
during the course of this investigation and on Octo-
ber 20, 1954, he first met plaintiffs' counsel and
agent, John A. Brant, and stated that he wished to
examine the proprietorship books and records [19]
maintained by Clifford O. Boren and Delta M.
Boren, for the years 1950 and 1951. On that date
Mr. Brant advised that neither affiant nor Internal
Revenue Agent Forrest P. Calkins, who also had
been assigned to the case, could examine said rec-

ords or hold any conversations with Mr. or Mrs. Boren. Prior to that date, neither Forrest P. Calkins nor affiant had been engaged in any examination of plaintiffs' income tax returns.

Your affiant did not ask plaintiffs' counsel's permission to examine the books and records of Clifford O. Boren Contracting Co., Inc., until December 7, 1954; that plaintiffs' counsel, John A. Brant, first stated on that date that he would not make such records available; that he further stated he would require a Commissioner's summons to be served before he would permit either affiant or Agent Calkins to examine said records; that later on the same day, Mr. Brant stated he would not require a summons but that he would require that Forrest P. Calkins be formally assigned to the examination of said tax returns; and it was not until December 15, 1954, that affiant and Forrest P. Calkins commenced the examination of the records of the Clifford O. Boren Contracting Co., Inc.

Preliminary investigation of the taxable years 1950 and 1951 of the Borens shows that in excess of \$40,000.00 of taxable income was not reported by the taxpayers as required by law. No evidence has been discovered to date tending to show that this nondisclosure was due to mistake, inadvertence, or other justifiable or legal reason, or tending to show that it was not done with the purpose and intent to evade and defeat the payment of the taxpayers' income taxes.

In connection with affiant's aforesaid investiga-

tion of the tax liability of Clifford O. Boren and Delta M. Boren, for the years 1950 and 1951, examination of the Clifford O. Boren Contracting Co., Inc., records was made by affiant and Forrest P. Calkins on only the following dates: December 15, 1954; December 16, 1954, 9:00 a.m. to [20] 12:10 p.m.; January 19, 1955; February 11, 1955; and on July 11, 13, 14, and 15, 1955. During the July period, examination was conducted only for less than half of each day, owing to the state of health of plaintiffs' counsel, John A. Brant, who insisted on the examination being conducted only in his presence.

That your affiant and Internal Revenue Agent Calkins have been denied access to the books and records of the Clifford O. Boren Contracting Co., Inc. from and after July 15, 1955, although they have not completed their investigation into the correctness of the tax returns filed by Clifford O. Boren and Delta M. Boren.

That a further examination of the books, records, papers, etc., of the Clifford O. Boren Contracting Co., Inc., to determine the correctness of the tax returns filed by Clifford O. Boren and Delta M. Boren, is necessary and reasonable and that the issuance of summonses to the Clifford O. Boren Contracting Co., Inc. and to the responsible officers and custodians, Clifford O. Boren, President, and Delta M. Boren, Vice-President, was necessary and reasonable in the circumstances.

/s/ LLOYD M. TUCKER

Subscribed and sworn to before me this 19 day of September, 1955.

[Seal] JOHN A. CHILDRESS,
Clerk United States District Court, Southern District of California. Signed by Mary O. Smith, Deputy. [21]

Petitioner's Exhibit No. 2.

[Endorsed]: Filed September 19, 1955.

[Title of District Court and Cause.]

ORDER TO SHOW CAUSE

Upon reading and considering petition of Lloyd M. Tucker, Special Agent, Internal Revenue Service, and good cause appearing therefor,

It Is Hereby Ordered that Clifford O. Boren, President, Clifford O. Boren Contracting Co., Inc., respondent, appear before this Court at San Diego, on the 24th day of October, 1955, at 10 o'clock a.m., or as soon thereafter as counsel may be heard, to show cause, if any there be, why an attachment should not issue against him as for a contempt and why he should not be compelled to answer petitioner's questions and produce books, records, papers and data referred to in said petition, and further why he should not be held in civil contempt.

It is further ordered that a certified copy of the petition [22] and a certified copy of this order be served on said Clifford O. Boren by the United States Marshal within 10 days, after date hereof,

and that such service shall be deemed to be sufficient for due notice.

Dated: This 30th day of September, 1955.

/s/ LEON R. YANKWICH,

U. S. District Judge [23]

[Endorsed]: Filed September 30, 1955.

[Title of District Court and Cause.]

MOTION TO VACATE ORDER TO SHOW
CAUSE

To: Lloyd M. Tucker, and Laughlin E. Waters,
United States Attorney, and Edward R. Mc-
Hale, Assistant United States Attorney, his at-
torneys:

Please Take Notice that on the 17th day of Oc-
tober, 1955, at 10:00 o'clock a.m., or as soon there-
after as counsel can be heard, respondents and each
of them, will move the above-entitled Court for an
order vacating the Orders to Show Cause issued out
of the above-entitled Court on September 19, 1955,
on the ex parte application of petitioner and di-
rected to Clifford O. Boren Contracting Co., Inc.,
and Delta M. Boren, and vacating the Order to Show
Cause issued out of the above-entitled Court on
September 30, 1955 on the ex parte application of
petitioner and directed to Clifford O. Boren.

Said motion will be made upon the grounds that
the petition fails to state a claim upon which an at-

tachment against the respondents, or either of them, could issue as for a contempt, and fails to state a claim upon which respondents, or either of them, could be held in civil contempt. [24]

Said motion will be based upon this notice of motion, the petition on file herein, and Memorandum of Points and Authorities attached hereto.

Dated: October 5, 1955.

TORRANCE & WANSLEY,
/s/ By JOHN A. BRANT,
Attorneys for Respondents [25]

[Endorsed]: Filed October 5, 1955.

[Title of District Court and Cause.]

MEMORANDUM IN OPPOSITION TO RE- SPONDENTS' MOTION TO VACATE OR- DER TO SHOW CAUSE

Petitioner Lloyd M. Tucker in his capacity as Special Agent of the Internal Revenue Service has issued summonses to the respondents as authorized by Section 7602 of the Internal Revenue Code of 1954. This Court upon request of petitioner issued Orders to Show Cause ordering respondents to appear before this Court and show cause, if any, why they should not be compelled to answer questions and produce books, records, papers, and data and why an attachment should not be issued.

Section 7602 of the Internal Revenue Code of 1954 provides that the Secretary or his delegate may issue a summons to any person to testify and produce such books, papers and other data as may be relevant or material to the inquiry being made. [29] Section 7603 of the Internal Revenue Code of 1954 provides for the method of service of such summons. Section 7604 of the Internal Revenue Code of 1954 provides for the enforcement of the summons. In their Memorandum of Points and Authorities, respondents seek to show that there are two kinds of summonses. One issued by the Collector and one issued by the Commissioner and cites cases holding that a Commissioner's summons needs the aid of the Court to compel attendance while contempt proceedings may ensue immediately should a Collector's summons be disregarded. Respondent correctly states the situation which obtained under the Internal Revenue Code of 1939; however, the Internal Revenue Code of 1954 broadened the old Collector's summons (Section 3615, Internal Revenue Code of 1939) to encompass any summons issued by the Secretary or his delegate. Section 7604 (b) of the Internal Revenue Code of 1954 specifically provides that when a person refuses to testify or produce books, data, etc., the Secretary or his delegate may apply to the Judge of the United States District Court for an attachment against such person for contempt.

The Orders to Show Cause were properly issued by this Court in compliance with Section 7604(b) of the Internal Revenue Code of 1954.

Dated: October 14, 1955.

LAUGHLIN E. WATERS,

United States Attorney

EDWARD R. McHALE,

Asst. U. S. Attorney, Chief, Tax
Division

ROBERT H. WYSHAK and

BRUCE I. HOCHMAN,

HARRY D. STEWARD and

HOWARD HARRIS,

Asst. U. S. Attorneys

/s/ EDWARD R. McHALE,

Attorneys for Petitioner

[30]

[Endorsed]: Filed October 14, 1955.

[Title of District Court and Cause.]

ANSWER TO PETITION FOR ORDERS OF
ATTACHMENT OF PERSON FOR CIVIL
CONTEMPT

Your Respondents Clifford O. Boren, Delta M. Boren, and Clifford O. Boren Contracting Co., Inc. answer the Petition for Orders of Attachment of Person For Civil Contempt in the above-entitled matter and admit, deny and allege as follows:

I.

In answer to paragraph III of the Petition, admit that the Internal Revenue tax liability of Clifford O. Boren and Delta M. Boren for the cal-

endar years 1950 and 1951 was under inquiry and determination by the Internal Revenue Service, and alleges that said tax liability has been determined. Except as expressly admitted, deny each and every allegation in said paragraph.

II.

In answer to paragraph V of the Petition, admit that respondents have possession, care and custody of certain books, records, papers and data set forth in the Petition. Except as expressly admitted, [31] deny each and every allegation in said paragraph.

III.

In answer to paragraph XI of the Petition, deny each and every allegation in said paragraph contained, and allege that in response to said summons they appeared before petitioner, produced the books and records summoned, and testified, but refused to permit the examination of said books and records for the reasons set forth in Exhibit D attached to the Petition.

For a second and separate defense to the Petition, respondents allege:

One Inspection of the Books of Account of Clifford O. Boren Contracting Co., Inc. Has Been Made in Connection with the Tax Liability of Clifford O. Boren and Delta M. Boren for 1950 and 1951.

I.

Agents of the Bureau of Internal Revenue commenced the examination of the federal income tax

returns of Clifford O. Boren and Delta M. Boren for the taxable years 1950 and 1951 on or about November 2, 1953. The books of account of Clifford O. Boren Contracting Co., Inc. were available for examination, and former Revenue Agent Charles D. Ford represented to Delta M. Boren that information had been obtained from the corporation.

II.

From the commencement of the examinations and until September 8, 1954, Clifford O. Boren and Delta M. Boren made available to Revenue Agents Henry Miller and Charles D. Ford, their books, papers, records and other data bearing upon the examinations being conducted, and also provided these agents with the assistance of the Certified Public Accountant of Clifford O. Boren and Delta M. Boren to facilitate the examinations, and otherwise fully cooperated in the conduct of the examinations.

III.

On May 11, 1954, petitioner Tucker was assigned to assist in the examination, pursuant to a request therefor made by Charles D. Ford on or about April 28, 1954.

IV.

On September 8, 1954, Revenue Agent Ford contacted Delta M. Boren and at that time and on September 14, 1954 and September 28, 1954 [32] solicited employment by Clifford O. Boren, Delta M. Boren and Clifford O. Boren Contracting Co., Inc. of himself and his associates to represent

respondents in connection with their income taxes for 1950 and 1951, which representation would include the use of information which had been obtained in the conduct of the investigation by the Bureau. On October 6, 1954, respondents through their counsel reported the solicitations to authorities in the Bureau of Internal Revenue. On that date Revenue Agent Forrest P. Calkins was assigned to make a re-examination. Revenue Agent Charles D. Ford resigned from the service on or about September 10, 1954.

V.

Subsequent to October 6, 1954, respondents received information which indicated that there were, and now are, persons still in the Bureau of Internal Revenue who are connected with the investigation of this case, who have a close, personal relationship with Ford.

VI.

These matters are now being investigated by the Special Intelligence Unit of the Treasury Department and by the Inspection Service.

VII.

On October 20, 1954, petitioner Tucker and Revenue Agent Forrest P. Calkins appeared at the offices of respondents' attorneys and informed them that they had been assigned to complete the Boren audit for the years 1950 and 1951. Revenue Agent Calkins stated at that time that he wanted to start from "scratch", disregarding the examinations which had been in process about a full year.

VIII.

Upon the commencement of the re-examination of the returns of Clifford O. Boren and Delta M. Boren for the calendar years 1950 and 1951 by petitioner Tucker and Calkins, they demanded that the corporation make available to them the books, papers, records and other data of the corporation for the fiscal year July 1, 1951 to April 30, 1952, to be used by them in the examination of the returns of Clifford O. Boren and Delta M. Boren for the years 1950-1951. Tucker and Calkins agreed to contemporaneously examine the said books and records for the dual purposes of ascertaining the tax liability of Clifford O. Boren and Delta M. Boren for the calendar years 1950-1951, and of ascertaining the [33] tax liability of the corporation for the fiscal year ended April 30, 1952. During the period October 18, 1954 and July 15, 1955, Tucker and Calkins examined the corporate books and records for these dual purposes. Throughout the examination the primary emphasis of Tucker and Calkins was the tax liability of Clifford O. Boren and Delta M. Boren for the years 1950 and 1951.

IX.

In the conduct of the examination of the corporation's books and records by Tucker and Calkins, they had available for examination, and did examine, the general journal, cash journal, general ledger, payroll records, and all of the payroll checks of the corporation for the period July 1, 1951 to April 30, 1952. Calkins made extensive

notes and transcripts from said books and records, and the payroll checks and records. Tucker and Calkins examined the payroll records and checks and Tucker made abstracts of information from the payroll records and checks. These examinations were made in connection with the matter of the tax liability of Clifford O. Boren and Delta M. Boren for the calendar years 1950 and 1951.

X.

Prior to July 11, 1955, Tucker and Calkins completed their examination of the payroll records and payroll checks and these records and checks were returned to the corporation. During the period between July 11, 1955 and July 15, 1955, Tucker and Calkins again demanded to examine said payroll records and payroll checks. In compliance with said demand, the corporation again delivered and made available to Tucker and Calkins the payroll records and checks.

XI.

The previous examination of the records of the corporation in connection with the investigation of the tax liability of Clifford O. Boren and Delta M. Boren render further examinations of said records unnecessary and oppressive. Tucker and Calkins have extensively examined the payroll records and payroll checks of the corporation.

XII.

The only books and records which petitioner wants to examine are the payroll checks of the

corporation signed by the persons named in [34] the summons for the period July 1, 1951 to December 31, 1951.

For a third and separate defense, respondents allege:

Tax Liability of Clifford O. Boren and Delta M. Boren for 1950 and 1951 Has been Determined.

I.

Respondents refer to paragraphs I through XI, inclusive, of their second defense, and by said reference incorporate said paragraphs herein.

II.

Under the provisions of Section 6501 of the Internal Revenue Code of 1954, any tax imposed by the Internal Revenue Code must be assessed within three years after the return was filed.

III.

A joint income tax return of Clifford O. Boren and Delta M. Boren for the calendar year 1950 was made and filed on or prior to March 15, 1951. In the month of January, 1954, Clifford O. Boren and Delta M. Boren signed a waiver of the Statute of Limitations for the calendar year 1950, which waiver extended the time for assessment of a deficiency to June 30, 1955. The period within which the Commissioner of Internal Revenue could make a redetermination of the income tax liability of Clifford O. Boren and Delta M. Boren for the calendar year 1950 expired on June 30, 1955.

IV.

Under date of March 11, 1955, the Commissioner issued his Notice of Deficiency to Clifford O. Boren and Delta M. Boren for the taxable year 1950.

V.

On June 6, 1955, Clifford O. Boren and Delta M. Boren filed with the Tax Court of the United States a petition for redetermination of their tax liability for the taxable year 1950.

VI.

Clifford O. Boren and Delta M. Boren, and each of them, made and filed income tax returns for the calendar year 1951 on or prior to March 15, 1952. The period within which the Commissioner of Internal Revenue could make a redetermination of the income tax liability of Clifford O. Boren and Delta M. Boren for the calendar year 1951 expired on March 15, 1955. [35]

VII.

Under date of March 11, 1955, the Commissioner issued Notices of Deficiencies for Clifford O. Boren and Delta M. Boren For the taxable year 1951.

VIII.

On or about July 22, 1955, the Commissioner assessed against Clifford O. Boren and Delta M. Boren the taxes, interest and penalties proposed to be assessed in said Notices of Deficiency. There are attached hereto marked Exhibit "A" and Exhibit

“B” true copies of the Statement of Income Tax Due for Clifford O. Boren and Delta M. Boren, showing said assessments. Delta M. Boren has paid the taxes, interest and penalties demanded in said statement.

For a fourth and separate defense, respondents allege:

Failure to Utilize prior opportunity.

I.

Respondents refer to paragraphs I through XI, inclusive, of their second defense, and by said reference incorporate said paragraphs herein.

II.

Petitioner Tucker had available to him throughout the course of the re-examination being made by petitioner and Calkins all of the books and records of Clifford O. Boren Contracting Co., Inc. now sought by petitioner Tucker in his summons. During this period Tucker spent less than five per cent of the time actually examining said books and records. More than 95% of Tucker's time was devoted to leisurely relaxing and enjoying the comforts afforded by the offices of counsel for respondents.

For a fifth and separate defense, respondents allege:

Examination Seeks Information for Criminal Prosecution and Not Ascertainment of Tax Liability.

I.

Respondents refer to paragraphs I through XI, inclusive, of their second defense, and by said reference incorporate said paragraphs herein.

II.

On July 20, 1955, petitioner Tucker demanded the re-examination of the payroll records and checks of the corporation. Said records and checks had been examined by both Tucker and [36] Calkins throughout the period of examination and had repeatedly been made available to Tucker and Calkins. At the time of this demand, Notices of Deficiency had been issued by the Commissioner for all respondents. Tucker acknowledged that he did not want to re-examine the records and checks for the purpose of adjusting or changing the Notice of Deficiency.

Respondents are informed and believe, and therefore state the fact to be, that the sole purpose of the re-examination sought by the summonses is to attempt to procure evidence for the purpose of a possible criminal prosecution against respondents.

Notice of additional Inspection.

For a sixth and separate defense, respondents allege:

I.

Respondents refer to paragraphs I through XI, inclusive, of their second defense and paragraphs I through VIII, inclusive, of their third defense,

and by said reference incorporate said paragraphs herein.

II.

One examination of the books of account of the corporation has been made for the period July 1, 1951 to December 31, 1951 in connection with the matter of the income tax liability of Clifford O. Boren and Delta M. Boren for the calendar years 1950 and 1951. None of the respondents have requested a re-examination of the corporation's books of account. Neither the Secretary of the Treasury nor his delegate, after investigation, has notified the corporation in writing that an additional inspection is necessary. The examination sought by the summonses is unnecessary.

Petitioner Lacks Authority.

For a seventh and separate defense, respondents allege:

I.

Respondents refer to paragraphs I through XI, inclusive, of their second defense and paragraphs I through VIII, inclusive, of their third defense, and by said reference incorporate said paragraphs herein.

II.

The factual basis upon which authority to issue summonses under [37] Section 7602 is premised does not exist for the summonses issued by Tucker. Clifford O. Boren and Delta M. Boren made timely returns for the calendar year 1951. The Commis-

sioner of Internal Revenue has heretofore ascertained the correctness of the returns filed by Clifford O. Boren and Delta M. Boren for said years. No question of liability at law or in equity of any transferee or fiduciary of any person in respect of any internal revenue tax, or the collection of any internal revenue tax is involved.

Records not Material.

For a eighth and separate defense, respondents allege:

I.

Respondents refer to paragraphs I through XI, inclusive, of their second defense, and by said reference incorporate said paragraphs herein.

II.

The books and records of the corporation for the period July 1, 1951 to December 31, 1951 demanded in said summonses are neither material nor relevant to the matter of the income tax liability of Clifford O. Boren and Delta M. Boren for the calendar year 1950.

No Probable Cause.

For a ninth and separate defense, respondents allege:

I.

Respondents refer to paragraphs I through XI, inclusive, of their second defense, and by said reference incorporate said paragraphs herein.

II.

Said summonses were not issued upon probable cause, supported by the oath or affirmation of petitioner or any other person.

III.

No probable cause is shown by the petition.

Wherefore, your respondents pray that the petition be dismissed and for such other and further relief as to the Court may seem just and proper.

TORRANCE & WANSLEY

/s/ By JOHN A. BRANT

[38]

Duly Verified. [39]

[Endorsed]: Filed November 10, 1955.

TELEPHONE BELMONT 3-1111

1 "FORM 17A 1951 1
Revised May 1953 Clifford O. Boren 2
2 U.S. Treasury Department c/o Torrance & Wansley Your Copy
Internal Revenue Service 1216 Bk of America Bldg
3 San Diego Calif
554-01-3699 27-1005740/52L
4 7-510252/55L BK 536

Reference and Date				Assessment	Amount Paid	Balance Due
6	STATEMENT OF	JUL 22 55			6,490.77	
7	INCOME TAX	JUL 22 55	IN		1,305.62	
7	DUE	JUL 22 55	P		3,245.39	11,041.78*

8 This bill for the amount shown as
9 "Balance Due" is being sent to you in
accordance with law. The law also
10 requires that interest at 6 percent
per year until date of payment be
11 added unless this amount is paid
within 10 days from date of this
notice.

12 Amounts shown in "Assessment"
above are for tax unless identified
13 as penalty by letter "P" or interest
by letter "I."

Keep this copy for your records. For
prompt identification of your account and
to insure proper credit please return Dis-
trict Director's Copy with your remittance.

EXHIBIT "A"

18 "FORM 17A 1951 1
Revised May 1953 Delta M. Boren 2
19 U.S. Treasury Department c/o Torrance & Wansley Your Copy
Internal Revenue Service 1216 Bank of America Bldg
20 San Diego Calif
567-26-0490 27-1005741/52L
21 7-510253/55L BK 536

Reference and Date				Assessment	Amount Paid	Balance Due
23	STATEMENT OF	JUL 22 55			6,490.77	
24	INCOME TAX	JUL 22 55	IN		1,305.62	
24	DUE	JUL 22 55	P		3,245.39	11,041.78*

25 This bill for the amount shown as
26 "Balance Due" is being sent to you in
accordance with law. The law also
27 requires that interest at 6 percent
per year until date of payment be
28 added unless this amount is paid
within 10 days from date of this
notice.

29 Amounts shown in "Assessment"
above are for tax unless identified as
30 penalty by letter "P" or interest by
letter "I."

Keep this copy for your records. For
prompt identification of your account and
to insure proper credit please return Dis-
trict Director's Copy with your remittance.

EXHIBIT "B"

[Title of District Court and Cause.]

AFFIDAVIT OF LLOYD M. TUCKER

United States of America,
Southern District of California—ss.

Lloyd M. Tucker, being first duly sworn, deposes and says:

That affiant is now and has been for the last nine years a Special Agent of the Internal Service and for the four years last past has been assigned to the San Diego office of the Internal Revenue Service. That his duties primarily concern the investigation of alleged evasion of income taxes and matters related thereto in the enforcement of the Internal Revenue Laws.

That on October 20, 1954, in accordance with an official assignment of his office affiant commenced an investigation of the tax liability of Clifford O. Boren and Delta M. Boren for the years 1950 and 1951. During the course of the investigation affiant was informed that one of the persons carried as a salaried employee in the 1951 payroll account of the Clifford O. Boren Contracting Co., Inc., for convenience hereinafter referred to as the Company, was not [41] employed by the Company or Delta M. Boren or Clifford O. Boren; that said "employee" performed no service for the Company or said individuals in any respect and rarely appeared on the premises of the Company.

An examination of the payroll records of the com-

pany by this affiant and Internal Revenue Agent Forrest P. Calkins disclosed that the Company records carried said "employee" as a full time employee at 40 hours per week during the latter half of 1951.

Weekly payroll checks issued by the Company to said "employee" for the period June 29 to December 5, 1951, disclosed endorsements by said "employee" and Delta Boren.

This affiant and Agent Calkins examined a federal income tax return filed in the name of said "employee" for the calendar year 1951, which reported that said "employee" was paid the sum of \$2,853.03 from Clifford O. Boren and the sum of \$2,817.97 from the Company as salary or wages.

Said "employee" has denied under oath that she signed and filed or caused to be filed an income tax return for the year 1951 reporting said salary or wages from said sources and has denied working for either the Clifford O. Boren Construction Company, Inc. or Clifford O. Boren for more than 10 or 12 days in 1951.

From said "employee's" sworn denial it became apparent to your affiant that if the 1951 income tax return was filed and signed by someone other than said "employee", that it was probable that the purported endorsements of said "employee" on the payroll checks issued to said "employee" were placed there by some person other than said "employee".

Your affiant therefore deemed it essential to obtain photostatic or photographic copies of the pay-

roll checks issued to said "employee" for the purpose of having them analyzed by an expert document examiner to ascertain the true facts concerning the endorsements thereon. Accordingly, on July 13, 1955, he requested permission [42] from John A. Brant, who had custody of said checks at that time, to have them reproduced by means of photostating. Mr. Brant stated that affiant was not entitled to the checks and stated that he would not permit him to have photostats made of such checks.

If the purported endorsements of said "employee" were placed on the said payroll checks by Clifford O. Boren, Delta M. Boren, or by some other person who was under their direction and control, such acts could well result in an understatement of income on the 1951 corporation income tax return filed for the Clifford O. Boren Contracting Company, Inc., and in an understatement of net income on the part of the person or persons who received the use and benefits of the aforesaid payroll checks.

Affiant, in view of the above investigation, has reason to believe that other payroll records and checks of the Clifford O. Boren Contracting Co., Inc., may be erroneous or fraudulent in that other persons carried on the payroll records of the corporation are not bona fide employees and that either Delta M. Boren or Clifford O. Boren may have received the use and benefit of the amounts purportedly paid to other employees and may have failed to include said amounts in their own income tax returns.

/s/ LLOYD M. TUCKER

Subscribed and sworn to before me this 30th day of November, 1955.

[Seal] /s/ JOHN A. CHILDRESS,
Clerk United States District Court, Southern District of California. Signed by William W. Luddy, Deputy. [43]

Affidavit of Service by Mail attached. [44]

Petitioner's Exhibit No. 3.

[Endorsed]: Filed December 1, 1955.

[Title of District Court and Cause.]

MEMORANDUM IN SUPPORT OF ORDERS
TO SHOW CAUSE AND GOVERNMENT'S
RIGHT TO COMPEL PRODUCTION OF
CORPORATE BOOKS AND RECORDS
AND TO COPY SAME AND IN OPPOSITION
TO MOTION TO VACATE ORDERS
TO SHOW CAUSE

Preliminary Statement

Special Agent Lloyd M. Tucker filed this action to enforce Internal Revenue Service summonses on September 19, 1955. On that date a hearing was held in the Southern Division, San Diego, before the Honorable Harry C. Westover, District Judge, at which hearing John Brant, counsel for the respondents, was present in connection with a motion for preliminary injunction in action No. 1774-SD, Clifford O. Boren Contracting Co., Inc., Clifford O.

Boren and Delta M. Boren vs. Lloyd M. Tucker. The result of the hearing in No. 1774-SD was that counsel stipulated that proceedings in said matter go off calendar pending final determination of No. 1780-SD.

Statement of Facts

In action No. 1774-SD, there was filed on September 19, 1955, an affidavit of Lloyd M. Tucker in opposition to plaintiffs' motion for preliminary injunction which affidavit petitioner incorporates [53] herein by reference. In addition, in this action, Lloyd M. Tucker verified the petition and filed a further affidavit on December 1, 1955.

In brief, Lloyd M. Tucker has been conducting and is continuing an investigation of the tax liability of Clifford O. Boren and Delta M. Boren for the years 1950 and 1951. Agent Tucker has reasonable grounds to believe that the taxpayers failed to report in excess of \$40,000.00 of taxable income and that it was done with the intent to evade and defeat the payment of taxpayers' income taxes.

In particular, certain payroll records and checks issued to persons carried on the books of the Clifford O. Boren Contracting Co., Inc., appeared to have been falsified. Respondents, in their capacities as officers of the corporation, have refused to produce the payroll records and checks to permit the examination and copying of same by Agent Tucker. Photostating or copying of the checks and the endorsements thereon is necessary to determine whether there has been forced endorsements and the

receipt of the funds by either Clifford O. Boren or Delta M. Boren.

On September 6, 1955, Clifford O. Boren and Delta M. Boren as officers of the Clifford O. Boren Contracting Co., Inc., appeared in response to Special Agent Tucker's summonses served upon them but refused to produce the books and records of the corporation. [Exhibit D to the petition.]

Question Presented

Whether Clifford O. Boren and Delta M. Boren as officers of the Clifford O. Boren Contracting Co., Inc., should be compelled to produce the books, records, payroll records and checks summoned for the examination by Special Agent Tucker for photographing or copying.

Argument

The Government in an investigation to determine the tax liability has the right, through its agents, to issue summonses to [54] third parties to compel them to produce books and records and to testify concerning the books or records. Internal Revenue Code of 1954, §7602, 7603; *Chapman vs. Goodman*, 219 Fed. 2d 802 (9 Cir. 1955); *Tucker vs. Hubner*, 129 Fed. Supp. 110 (S.D. Cal. 1955), on appeal to 9 Cir., Docket No. 14704; *United States vs. People's Deposit Bank, et al.*, 112 Fed. Supp. 720 (E.D. Ky. 1953), *Affm'd*, 212 Fed. 2d 86 (6 Cir. 1954), *Cert. Denied*, 348 U.S. 838.

In the course of an investigation, Government agents may prepare copies or facsimiles of documents rightfully in their possession and such copies,

facsimiles or photostats may be admitted in evidence in any subsequent trial where the original documents are for some reason not available. *Lisansky vs. United States*, 31 Fed. 2d 846 (4 Cir., 1929), Cert. denied, 279 U.S. 873; *Cooper vs. United States*, 9 Fed. 2d 216 (8 Cir., 1925).

In fact, for the orderly transactions of business, it is preferable that copies or photostats be placed in evidence rather than the original records. This enables business houses, banks, etc., to continue in possession of their records for which they may have a continuing need while still permitting the Court to have exact copies of the records in evidence. Here, it is to the corporation's advantage that photostating or photographing the checks be done, since otherwise the records will have to be retained by the Government for an extended period of time to permit an expert document examiner to analyze them.

The respondents allege in an answer filed herein and in other memoranda and affidavits filed in action No. 1774-SD, that the agents have had sufficient opportunity to and have, in fact, inspected the books and records of the corporation and that any further inspection would amount to a "fishing expedition" and an unreasonable search and seizure, and an undue burden on the respondents. These contentions are rebutted by the affidavits of Special Agent Lloyd M. Tucker filed September 19, 1955, in action No. 1774-SD and his affidavit of [55] December 1, 1955, filed in action No. 1780-SD, which affidavits indicate that the agents were not given

sufficient opportunity to properly examine the books and records of the corporation. The affidavits further indicate that the investigation of the tax liability involving Clifford O. Boren and Delta M. Boren is still continuing, and that further access to the books and records of Clifford O. Boren Contracting Co., Inc., is necessary to the investigation. In the latest affidavit, the real dispute between the parties is clarified. Special Agent Tucker desires to photostat or photograph certain payroll checks and examine further the payroll records. This is the real issue between the parties.

Conclusion

It is respectfully submitted that under the broad powers contained in §§7602, 7603 and 7604 of the Internal Revenue Code of 1954, the Government, through its special agents, has a right to examine and, if necessary, photograph or photostat the records of the third person, the corporation.

Therefore, the Court should compel Clifford O. Boren and Delta M. Boren to produce the records or stand committed for contempt.

Respectfully submitted,

LAUGHLIN E. WATERS,

United States Attorney

EDWARD R. McHALE,

Asst. U. S. Attorney, Chief, Tax
Division

ROBERT H. WYSHAK and

BRUCE I. HOCHMAN,

HARRY D. STEWARD and
HOWARD HARRIS,

Asst. U. S. Attorneys

/s/ By EDWARD R. McHALE,

Attorneys for Petitioner [56]

Affidavit of Service by Mail attached. [57]

[Endorsed]: Filed December 2, 1955.

[Title of District Court and Cause.]

AFFIDAVIT OF JOHN A. BRANT

United States District Court

For the Southern District of California—ss.

John A. Brant, being first duly sworn, deposes and says:

Your affiant is an attorney at law and one of the attorneys for the respondents. Petitioner Lloyd M. Tucker and Revenue Agent Forrest P. Calkins first appeared in my office on October 20, 1954. On that date they informed your affiant that they had been assigned to complete the audit of the returns of Clifford O. Boren and Delta M. Boren for the calendar years 1950 and 1951. Revenue Agent Forrest P. Calkins stated that he wanted to start the examination from "scratch." Petitioner Tucker and Revenue Agent Calkins informed your affiant at that time that they intended to conduct a criminal investigation of Clifford O. Boren and Delta M. Boren for these years.

Petitioner Tucker and Revenue Agent Calkins

appeared at the office of your affiant for the purpose of conducting their examination on the following [58] dates and devoted the amount of time shown in making their investigation and examining the books and records of respondent Clifford O. Boren Contracting Co., Inc.

October 22, 1954: One hour.

November 4, 1954: One hour.

December 7, 1954: One hour.

December 15, 1954: Four and one-half hours.

December 16, 1954: Three hours.

December 30, 1954: One-half hour.

January 19, 1955: Five and one-half hours.

January 20, 1955: One hour.

February 11, 1955: Four hours.

July 11, 1955: Two and one-half hours.

July 13, 1955: Six hours.

July 14, 1955: Three and one-half hours.

July 15, 1955: Three hours.

During the course of the examination petitioner and Revenue Agent Calkins requested that the payroll records and checks of respondent corporation for the fiscal year July 1, 1951 to April 30, 1952 be made available to them. Your affiant obtained these records and delivered them to petitioner and Calkins. Both petitioner and Calkins examined these records in detail. These records and checks remained available for examination until they informed your affiant that they were finished with them. On July 11, 1955 petitioner and Calkins again requested the payroll records and payroll checks and they were

again delivered to them on July 13, 1955 for examination.

During the examination by petitioner Tucker and Mr. Calkins, petitioner spent only a small percentage of his time actually examining the available books and records. Most of his time was spent relaxing while Mr. Calkins worked. One of the few occasions when petitioner Tucker did examine the available records was when he examined the payroll records and checks.

In a letter written to your affiant dated October 19, 1955, Edward R. McHale, Esquire, Assistant United States Attorney, and attorney for petitioner Tucker, admitted that the payroll checks of respondent corporation are the only [59] documents which petitioner wants to examine.

The examination of the books and records by petitioner Tucker and Revenue Agent Calkins was for the primary purpose of investigating the tax liability of Clifford O. Boren and Delta M. Boren for the calendar years 1950 and 1951, and for the incidental purpose of investigating the tax liability of respondent corporation for the fiscal year July 1, 1951 to April 30, 1952.

Your affiant has examined a copy of the employee's affidavit referred to in the affidavit filed herein by Lloyd M. Tucker and said affidavit recites that it was signed by the employee on March 16, 1955.

Your affiant has examined the notices of defici-

ency issued by the Commissioner of Internal Revenue to respondent corporation under date of July 15, 1955 for the fiscal year July 1, 1951 to April 30, 1952. Said notice of deficiency disallows as a deduction salaries and wages in the amount of \$2,-817.97.

Your affiant has also examined the notices of deficiency issued by the Commissioner of Internal Revenue to respondents Clifford O. Boren and Delta M. Boren under date of March 11, 1955 for the calendar years 1950 and 1951. The notice of deficiency for the year 1950 disallows as a deduction salaries and wages in the amount of \$8,911.93. The notice of deficiency for the year 1951 disallows as a deduction salaries and wages in the amount of \$4,-353.03.

Your affiant is informed and believes, and therefore states the fact to be, that included within these disallowed deductions are the salaries and wages referred to on page two of the affidavit of Lloyd M. Tucker.

In each of the notices of deficiency referred to hereinabove, the Commissioner of Internal Revenue has asserted a 50% penalty purportedly in accordance with the provisions of Section 293 (b) of the Internal Revenue Code of 1939.

On July 20, 1955, petitioner Tucker stated to your affiant that he did not want to re-examine the payroll checks of respondent corporation for the purpose of changing the notice of deficiency issued to it.

/s/ JOHN A. BRANT

Subscribed and sworn to before me this 5th day of December, 1955.

[Seal] /s/ MARY JOAN TRUEBLOOD,
Notary Public in and for the County of San Diego,
State of California. [60]

Respondents' Exhibit "B".

[Endorsed]: Filed December 5, 1955.

[Title of District Court and Cause.]

MINUTES OF THE COURT

Date: Dec. 5, 1955, at San Diego, Calif.

Present: Hon. Wm. C. Mathes, District Judge;
Deputy Clerk: P. D. Hooser; Reporter: Don P.
Cram; Counsel for Plaintiff: Edw. R. McHale,
Asst. U. S. Attorney.

Proceedings: For hearing (1) motion of respondents, filed Oct. 5, 1955, to vacate order to show cause, and (2) order to show cause, filed Sept. 30, 1955, as to Clifford O. Boren and Delta M. Boren why an attachment should not issue against them, etc.

It Is Ordered that motion (1) is granted in part and denied in part; Attorney Brant to prepare and settle in five days order.

Attorney Brant makes a statement asking to be relieved as counsel, but upon further consideration, and upon a statement by Attorney McHale, and with permission of the Court, states he will continue to act as attorney.

Affidavit of Lloyd M. Tucker, filed in Case No. 1774-SD Civil, Sept. 10, 1955, Affidavit of Lloyd M. Tucker, filed in Case No. 1780-SD Civil, Dec. 1, 1955, and Petition filed in Case No. 1780-SD Civil, Sept. 19, 1955, are incorporated by reference and received as pro tanto the direct examination of the petitioners.

Court recesses. At 3:35 p.m. court reconvenes herein.

Attorney McHale makes a statement. Petitioner's Exhibits 1, 2, and 3 are received in evidence, and received as pro tanto the direct examination of the petitioners. Respondents' Exhibits A and B are received in evidence.

Petitioner rests. Lloyd M. Tucker and Forrest P. Calkins, respectively, are called, sworn, and testify on direct examination by Attorney Brant.

Respondents' Exhibit C is received in evidence.

Respondents rest. Petitioner rests. Attorney Brant argues; at 5:10 p.m. Attorney McHale argues, and at 5:25 p.m. Attorney Brant argues.

The motion of the petitioner to strike the second and ninth separate defenses in respondents' answer to the petition is granted, and otherwise the motion to strike is denied. The separate defenses which stand are not sustained. The petition is sustained. The prayer of Paragraph 4 in the Court's opinion is sufficient in asking further relief to warrant the order with respect to copying or photographing. The petition is granted to the extent that the respondents are ordered to appear and give testimony in response thereto and to produce the documents therein

set forth in the summonses, Exhibits A, B, and C to the petition.

Respondents are ordered to appear at 3755 6th Avenue, San Diego, at 10 o'clock on the morning of December 7, 1955, and produce the records called for in the summonses and then and there give testimony with respect thereto as required by the summonses and in the event they fail so to do or give the testimony required of them at that time they are to appear before this court on December 13th, next, at 10 a.m. and then and there show cause, if any they have, why they and each of them should not be held in civil contempt of this Court and penalties assessed accordingly. The Government will prepare and settle under local rule 7 within three days Findings of Fact, Conclusions of Law and Order accordingly. This order is now amended to the extent that the Government will prepare and settle Findings, Conclusions and Order by tomorrow, December 6, 1955, and the respondents to appear and produce by 10 a.m. December 8, 1955.

The Court Finds it is a continuing examination and a further examination necessary to the examination being made to determine the question of whether or not there has been fraud in connection with the returns, as well as criminal prosecution, but the statutory basis for the examination is the open issue as to fraud liability. The fact that the information may be used in criminal prosecution the Court deems immaterial.

JOHN A. CHILDRESS,
Clerk

[61]

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW AND ORDER

On Monday, December 5, 1955, at 2 o'clock p.m., there regularly came on for hearing in this cause, in the Southern Division of this Court, sitting in San Diego, without a jury, the Honorable Wm. C. Mathes, United States District Judge, presiding, two orders directed to Clifford O. Boren, President, Clifford O. Boren Contracting Co., Inc., and Delta M. Boren, Vice President, Clifford O. Boren Contracting Co., Inc., to show cause, if any there be, why each of them should not be compelled to answer petitioner's questions and produce books, records, papers, and data, and in the event their failure so to do, why they and each of them should not be held in civil contempt; the petitioner, Lloyd M. Tucker, represented by his attorneys, Laughlin E. Waters, United States Attorney, and Edward R. McHale, Assistant United States Attorney, Chief, Tax Division, and the respondents, Clifford O. Boren, President, Clifford O. Boren Contracting Co., Inc., [62] Delta M. Boren, Vice President, Clifford O. Boren Contracting Co., Inc., and the Clifford O. Boren Contracting Co., Inc., represented by their attorneys Torrance & Wansley by John A. Brant and Albert W. Strang; and the petitioner having moved to strike all separate defenses raised in the answer, and the Court having granted the motion with respect to defenses two and nine, and having denied the motion with re-

spect to the other defenses; and the Court having heard the testimony, and having duly considered the same and the briefs and the oral arguments of counsel, now finds as follows:

Findings of Fact

I.

This action arises and jurisdiction is granted this Court under the provisions of the Internal Revenue Code of 1954, 68A Stat., Sections 7402, 7602, 7603, 7604, 7605; Federal Rules of Civil Procedure 64, 81(a)(3); and Title 28 United States Code, Sections 1340 and 1345.

II.

That petitioner, Lloyd M. Tucker, is a duly appointed and acting Special Agent of the Internal Revenue Service and has been authorized by the Secretary of the Treasury to perform the duties of such office and, specifically, the duties referred to in Sections 7603 and 7604 of the Internal Revenue Code, 1954.

III.

The respondent Clifford O. Boren Contracting Co., Inc., is a corporation duly organized and existing under the laws of the State of California and has its principal office in the City of San Diego, California.

IV.

Respondent Clifford O. Boren Contracting Co., Inc., and respondent Clifford O. Boren, its President, and respondent Delta M. Boren, its Vice-President, in their capacities as such, have possession, care, and custody of certain books, records,

papers and data hereinafter set forth; said books, records, papers and data contain therein entries relating to the business of the aforesaid Clifford O. Boren and Delta M. Boren; said books, records, papers and data are material and relevant to said inquiry. [63]

V.

Said books, records, papers and data are as follows: General Journal, Cash Journal, General Ledger, Payroll Records and Payroll Checks bearing the endorsement of any of the following named persons: Clifford O. Boren, Delta M. Boren, Marjorie H. Bell, Betty K. McCarthy, and the Clifford O. Boren Contracting Company, Inc., for the period from July 1, 1951 to December 31, 1951.

VI.

Commencing November 2, 1953, the Internal Revenue tax liability of Clifford O. Boren and Delta M. Boren for the calendar years 1950 and 1951 was continuously, and now is, under inquiry and determination by the Internal Revenue Service; the petitioner has reasonable cause to believe that Clifford O. Boren and Delta M. Boren may have filed false or fraudulent returns with intent to evade the tax or may have willfully attempted to defeat or evade the taxes imposed by the Internal Revenue Code.

VII.

Preliminary investigation of the taxable years 1950 and 1951 of the Borens led petitioner to believe that an amount in excess of \$40,000.00 of taxable income was not reported by the Borens as

required by law. Petitioner could discover no evidence tending to show that this non-disclosure was due to mistake, inadvertence or other justifiable or legal reason, or tending to show that it was not done with the purpose and intent to evade and defeat the payment of the taxpayers' income taxes.

VIII.

The petitioner, Tucker, was assigned to cooperate in the examination of the tax liability of the Borens for the years 1950 and 1951 on or about May 11, 1954. On or about December 7, 1954, petitioner, Tucker, and Revenue Agent Calkins commenced an examination of returns of Clifford O. Boren and Delta M. Boren for the calendar years 1950 and 1951, and on or about that date demanded that the corporation make available to them the books, papers, records and other data of the corporation for the fiscal year July 1, 1951 to April 30, 1952, to be used by them in the examination of the returns of Clifford O. Boren and Delta M. Boren for the years 1950 and 1951. From time to time during the period December 7, 1954 to July 15, 1955, Tucker and Calkins examined the corporate books and records for the purpose of ascertaining tax liability of Clifford O. Boren and Delta M. Boren for the calendar years 1950 and 1951, and for the purpose of ascertaining tax liability of the corporation for the fiscal year ending April 30, 1952. In the conduct of the examination of the corporation's books and records by Tucker and Calkins, they had available for examination, and did examine, the

general journal, cash journal, general ledger, payroll records, and all of the payroll checks of the corporation for the period July 1, 1951 to April 30, 1952. Calkins made extensive notes and transcripts from said books and records, and the payroll checks and records. Tucker and Calkins examined the payroll records and checks and Tucker made abstracts of information from the payroll records and checks. These examinations were made in connection with the matter of the tax liability of Clifford O. Boren and Delta M. Boren for the calendar years 1950 and 1951, and the tax liability of the corporation.

IX.

During the course of the investigation, and some time in March, 1955, Special Agent Tucker was informed that one of the persons carried on the payroll of the Clifford O. Boren Contracting Co., Inc., as an employee, and with respect to whom the payroll records indicated weekly payroll checks issued during the period June 29, 1951 to December 5, 1951, was not an employee of the corporation during that time and did not receive the wages shown as paid to her in the company's books and records. The petitioner caused a further investigation to be made and said "employee" denied under oath that she was paid the sum of \$2853.03 from Clifford O. Boren, and the sum of \$2817.97 from the corporation as salary or wages, or that she signed and filed, or caused to be filed, an income tax return for the year 1951 reporting said salary or wages from said sources, and further denied that

she was a full time employee and had worked for either Clifford O. Boren or the said Clifford O. Boren Construction Co., Inc., for more than ten or twelve days in 1951.

X.

The petitioner, Tucker, had reasonable cause to believe that several salary checks of the Clifford O. Boren Contracting Co., Inc., bearing endorsements of at least one employee and of [65] Delta M. Boren were not endorsed by said employee and that said employee was not a bona-fide employee, and that either Delta M. Boren or Clifford O. Boren, or both of them may have received the use and benefit of the amounts purportedly paid to other employees and may have failed to include said amounts in their own income tax returns for the years 1950 and 1951.

XI.

On August 25, 1955, summonses were issued by petitioner to the respondents Clifford O. Boren Contracting Co., Inc., to Clifford O. Boren as President of Clifford O. Boren Contracting Co., Inc., and to Delta M. Boren as Vice President of Clifford O. Boren Contracting Co., Inc., to appear before petitioner at 3755 Sixth Avenue, San Diego, California, on September 6, 1955, at 10:00 a.m., and there to testify and to produce among other documents said books, records, papers and data.

XII.

On August 25, 1955, at San Diego, California, summonses issued to Clifford O. Boren Contracting Co., Inc., and Clifford O. Boren, President, Clifford O. Boren Contracting Co., Inc., were personally served by delivering in hand to Clifford O. Boren attested copies thereof; on August 25, 1955, at San Diego, California, the summons issued to Delta M. Boren, Vice President, Clifford O. Boren Contracting Co., Inc., was served by leaving an attested copy with one Thelma Wertheimer, housekeeper for Delta M. Boren, at 4511 Utah Street, San Diego, California, the last and usual place of abode of Delta M. Boren.

XIII

Respondents Clifford O. Boren, President of the Clifford O. Boren Contracting Co., Inc., and Delta M. Boren, Vice President of the Clifford Boren Contracting Company, Inc., reside in San Diego County within the Southern District of California.

XIV.

At the time and place set for hearing on the summonses served upon said respondents, there appeared Delta M. Boren, Clifford O. Boren, and John A. Brant, their attorney. The Borens brought with them to the hearing certain books, records, and papers of Clifford O. Boren Contracting Co., Inc., kept by Delta M. Boren, as Vice President, and Clifford O. Boren, as President of said corporation. Upon demand [66] by petitioner Tucker

to examine the records, the respondents Clifford O. Boren, President, Clifford O. Boren Contracting Co., Inc., and Delta M. Boren, Vice President, Clifford O. Boren Contracting Co., Inc., refused to produce said records.

XV.

Respondents Delta M. Boren as Vice President of the Clifford O. Boren Contracting Co., Inc., and Clifford O. Boren as President of the Clifford O. Boren Contracting Co., Inc., and the Clifford O. Boren Contracting Co., Inc., did each wilfully and knowingly neglect and refuse to obey said summonses as required in that said respondents did appear at the time and place set forth in the summonses but did not produce said books, records, papers and data.

As Additional Findings with Respect to the Third and Separate Defense.

XVI.

A joint income tax return of Clifford O. Boren and Delta M. Boren for the calendar year 1950 was made and filed on or prior to March 15, 1951. In the month of January, 1954, Clifford O. Boren and Delta M. Boren signed a waiver of the Statute of Limitations for the calendar year 1950, which waiver extended the time for assessment of a deficiency to June 30, 1955. Under date of March 11, 1955, the Commissioner issued his Notice of Deficiency of taxes, fraud penalties and interest, to Clifford O. Boren and Delta M. Boren for the tax-

able year 1950. On June 6, 1955, Clifford O. Boren and Delta M. Boren filed with the Tax Court of the United States a petition for re-determination of their tax liability for the taxable year 1950. Clifford O. Boren and Delta M. Boren, and each of them, made and filed income tax returns for the calendar year 1951 on or prior to March 15, 1952.

XVII.

Under date of March 11, 1955, the Commissioner issued Notices of Deficiencies for Clifford O. Boren and Delta M. Boren for the taxable year 1951. On or about July 22, 1955, the Commissioner assessed against Clifford O. Boren and Delta M. Boren the taxes, interest and fraud penalties proposed to be assessed in said Notices of Deficiency. Delta M. Boren has paid the taxes, interest and penalties demanded in said statement. [67]

XVIII.

The tax liability of Delta M. Boren and Clifford O. Boren for the calendar years 1950 and 1951 with respect to fraudulent omissions of income has not been finally determined and their criminal liability has not been finally determined with respect to said years.

As Additional Findings With Respect to the Fourth and Separate Defense.

XIX.

Petitioner Tucker has never had exclusive pos-

session or control of the books, records, papers, payroll checks of the Clifford O. Boren Contracting Co., Inc., since the commencement of this examination; said petitioner has been permitted to examine them only in the presence and in the offices of the respondents' counsel and has been denied permission to make photostatic or photographic copies of any of said books, records, papers, checks, etc.

XX.

Petitioner Tucker in connection with this continuing examination of the tax liability of Clifford O. Boren and Delta M. Boren for the taxable years 1950 and 1951, and in order to determine the truth or falsity of the payroll records and checks, needs to have photographic or photostatic copies made of the endorsements on said checks, and to investigate further all payroll checks bearing the endorsements of either of the respondents. Respondents have denied, and are continuing to deny, petitioner Tucker this examination.

As Additional Findings With Respect to the Fifth and Separate Defense.

XXI.

On July 20, 1955, petitioner Tucker demanded examination of the payroll records and checks of the corporation. Said records and checks had been examined by both Tucker and Calkins throughout the period of examination and had repeatedly been made available to Tucker and Calkins. At the time

of this demand, Notices of Deficiency had been issued by the Commissioner for all respondents. Tucker acknowledged that he did not want to examine the records and checks for the purpose of adjusting or changing the Notice of Deficiency. [68]

XXII.

The purpose of Tucker's examination was to determine the correctness of the tax returns filed by the Borens with respect to possible assertion of additional assessments by reason of fraud and fraud penalty assessments and with respect to possible criminal tax liability of the Borens.

As Additional Findings With Respect to the Sixth and Separate Defense.

XXIII.

The tax investigation of the Borens commenced in November, 1953 and continued without interruption or termination since that date, and is still continuing.

None of the respondents has requested a re-examination of the corporation's books of account. Neither the Secretary of the Treasury, nor his delegate, after investigation, has notified the corporation in writing that an additional examination is necessary.

XXIV.

The Petitioner Tucker has been engaged in examining the books and records of the Clifford O. Boren Contracting Co., Inc., with respect to the

tax liability of Delta M. Boren and Clifford O. Boren for the years 1950 and 1951, continuously since December 7, 1954.

As Additional Findings With Respect to the Seventh and Separate Defense.

XXV.

The petitioner, Lloyd M. Tucker, is a Special Agent of the Internal Revenue Service, duly authorized and assigned to investigate the tax liability of the respondents, and has reasonable grounds to believe that the tax returns filed by the respondents for 1950 and 1951 are not correct, and that in consequence the respondents have additional liabilities with respect to civil fraud and may be liable under the criminal laws of the United States for filing false or fraudulent returns. [69]

As Additional Findings With Respect to the Eighth and Separate Defense.

XXVI.

The books, records and papers of the Clifford O. Boren Contracting Company, Inc., for the period July 1, 1951 to December 31, 1951, demanded in summonses to-wit: General Journal, Cash Journal, General Ledger, Payroll Records and Payroll Checks bearing the endorsement of any of the following persons: Clifford O. Boren, Delta M. Boren, Marjorie H. Bell, Betty K. McCarthy, and the Clifford O. Boren Contracting Co., Inc., are ma-

terial and relevant to the matter of the income tax liability of Clifford O. Boren and Delta M. Boren for the calendar year 1951.

XXVII.

Respondents having failed to sustain any of their separate defenses, and from the foregoing findings, the Court concludes as follows:

Conclusions of Law

I.

The Court has jurisdiction of this action and of the parties hereto.

II.

The petitioner is duly authorized to conduct and is conducting a continuing investigation into the tax liability of Delta M. Boren and Clifford O. Boren with respect to the taxable years 1950 and 1951, and in connection therewith is entitled to examine the books, records, papers, and other documents specified by him in the summonses issued under the Internal Revenue laws by authority of the Secretary of the Treasury or his delegate, to the respondents.

III.

The respondents Delta M. Boren, Vice-President, Clifford O. Boren Contracting Co., Inc., Clifford O. Boren, President, Clifford O. Boren Contracting Co., Inc., in their capacities as officers of said corporation, have custody and control of the books, records, papers and other documents sought to be examined by the petitioner, and each of them did

willfully and knowingly refuse and neglect to obey the summonses served upon them, in that said respondents did appear at the time and place set forth in the summonses but refused to produce the books, [70] records, papers and payroll records, etc. demanded.

IV.

The petitioner Tucker has reasonable cause to believe that the respondents Delta M. Boren and Clifford O. Boren may have filed false or fraudulent returns of income taxes for the years 1950 and 1951, with intent to evade the taxes or may have willfully attempted to defeat or evade the taxes imposed by the Internal Revenue Code.

V.

Petitioner Tucker has reasonable cause to believe that certain payroll records and checks of the Clifford O. Boren Contracting Company, Inc. were falsified or forged, and that either Delta M. Boren or Clifford O. Boren, or both of them, may have received the use and benefit of the amounts purportedly paid by the corporation to employees and may have failed to include said amounts in their own income tax returns.

VI.

Petitioner Tucker is entitled to examine the books, records, papers and payroll checks of the Clifford O. Boren Contracting Co., Inc., set forth in the summonses issued by him, and to photograph or photostat the books, records, papers, and payroll

checks, and any portion thereof that he deems necessary and proper.

VII.

Respondents having failed to sustain any of their separate defenses, the petitioner is entitled to the entry of an order of this Court directing the respondents Clifford O. Boren, President, Clifford O. Boren Contracting Co., Inc., and Delta M. Boren, Vice President, Clifford O. Boren Contracting Co., Inc., to appear before him and produce the following records: General Journal, Cash Journal, General Ledger, Payroll Records and Payroll Checks bearing the endorsement of any of the following named persons: Clifford O. Boren, Delta M. Boren, Marjorie H. Bell, Betty K. McCarthy, and the Clifford O. Boren Contracting Company, Inc., for the period from July 1, 1951 to December 31, 1951, on Thursday, December 8, 1955, at 10 o'clock a.m. at 3755 Sixth Avenue, San Diego, California; and in the event of their failure so to comply, they are ordered to be and appear before this Court at 10 o'clock a.m. Tuesday, December 13, 1955, in the Southern Division at San Diego, California, [71] to show cause why they and each of them should not be held in civil contempt for failure so to comply.

Dated this 7th day of December, 1955.

/s/ WM. C. MATHES

United States District Judge

ORDER

It is hereby ordered, adjudged, and decreed that respondents, Clifford O. Boren, President, Clifford O. Boren Contracting Co., Inc., and Delta M. Boren, Vice President, Clifford O. Boren Contracting Co., Inc., and the Clifford O. Boren Contracting Co., Inc., appear before Special Agent Lloyd M. Tucker on Thursday, December 8, 1955, at 10 o'clock a.m., at 3755 Sixth Avenue, San Diego, California, and produce, for examination, copying and photostating, the records called for in the summonses attached to the petition herein and heretofore served upon them, and then and there give testimony with respect thereto as required by the summonses, and in the event they fail so to do, or to give the testimony so required at that time, they are to be and appear before this Court on December 13, 1955, at 10 o'clock a.m. in the Southern Division, at San Diego, and then and there show cause, if any they have, why they and each of them should not be held in civil contempt of this Court and penalties assessed accordingly.

Dated this 7th day of December, 1955.

/s/ WM. C. MATHES

United States District Judge

Approved as to form this 6th day of December, 1955, pursuant to Local Rule 7(a).

TORRANCE & WANSLEY

/s/ By JOHN A. BRANT

[72]

[Endorsed]: Filed December 7, 1955.

[Title of District Court and Cause.]

MOTION FOR WRIT OF SUPERSEDEAS
PENDING APPEAL

To: Lloyd M. Tucker, and Laughlin E. Waters,
United States Attorney, and Edward R. Mc-
Hale, Assistant United States Attorney, his
attorneys:

Please Take Notice that on Wednesday, the 7th day of December, 1955, at 2:00 o'clock p.m., or as soon thereafter as counsel can be heard, respondents, and each of them, will move the above-entitled Court for a stay of the judgment made and entered in the above-entitled action pending the appeal of said judgment to the United States Court of Appeals for the Ninth Circuit, and to fix and determine the amount of a supersedeas bond to be filed by the respondents for the satisfaction of the costs and damages for delay, if for any reason the appeal is dismissed or if the judgment is affirmed, and to satisfy in full such costs and damages as said Court of Appeals may award.

Said motion will be made on the ground that unless said judgment is stayed pending appeal respondents' appeal therefrom would be ineffective and respondents would be irreparably damaged.

Said motion will be based upon this notice of motion, the records and files in this action, and the Memorandum of Points and Authorities attached hereto.

Dated: December 7, 1955.

TORRANCE & WANSLEY,
/s/ By JOHN A. BRANT,
Attorney for Respondents [74]

[Endorsed]: Filed December 7, 1955.

[Title of District Court and Cause.]

MINUTES OF THE COURT

Date: Dec. 7, 1955, at Los Angeles, Calif.

Present: Hon. Wm. C. Mathes, District Judge;
Deputy Clerk: P. D. Hooser; Reporter: Don P.
Cram; Counsel for Petitioner: E. R. McHale;
Counsel for Respondents: John A. Brant.

Proceedings: Attorney Brant states respondents intend to file notice of appeal and moves for a stay of execution pending appeal of order filed this date.

Attorney McHale opposes motion on grounds it is not a final and appealable order.

Attorney Brant makes a further statement in support of motion.

Court makes a statement.

Motion for stay as to existing order is denied; Attorney McHale to prepare and settle in three days order denying.

JOHN A. CHILDRESS,
Clerk [76]

[Title of District Court and Cause.]

ORDER

Respondents' Motion to Vacate the Order to Show Cause issued out of this Court on September 19, 1955, came on regularly for hearing on December 5, 1955, Laughlin E. Waters, United States Attorney, and Edward R. McHale, Assistant United States Attorney, appearing for petitioner, and John A. Brant, appearing for respondents, and the Court after considering the petition on file herein, and the arguments of counsel, and good cause appearing therefor,

It Is Hereby Ordered, Adjudged and Decreed that the portions of said Orders to Show Cause which require the respondents, and each of them, to show cause, if any there be, why an attachment should not issue against the respondents as for a contempt, are vacated and set aside. The remaining portions of said Orders to Show Cause shall remain in effect.

Done in Open Court December 5, 1955.

/s/ WM. C. MATHES,

U. S. District Judge [77]

Approved as to form:

Laughlin E. Waters, United States Attorney

Edward R. McHale, Asst. U. S. Attorney

/s/ Edward R. McHale,

Attorneys for Petitioner [78]

[Endorsed]: Filed December 7, 1955.

[Title of District Court and Cause.]

ORDER DENYING STAY OF JUDGMENT
AND WRIT OF SUPERSEDEAS

The above matter came on for hearing on Wednesday, December 7, 1955, at 2:00 o'clock p.m., before the Court, the Honorable Wm. C. Mathes, United States District Judge presiding, the parties represented by their respective counsel of record, John A. Brant for the respondents and movants, and Laughlin E. Waters, United States Attorney, and Edward R. McHale, Assistant United States Attorney, Chief, Tax Division, attorneys for Lloyd M. Tucker, on the motions of respondents for a stay of judgment made and entered in this action, and to fix and determine the amount of a supersedeas bond to be filed by respondents, and the Court having considered the file, the arguments of the parties, and it appearing to the Court that [79] the order made and filed the 7th day of December, 1955, with respect to which movants intend to file a notice of appeal is not a final and appealable order, now

It Is Hereby Ordered, Adjudged and Decreed that the motion of Clifford O. Boren Contracting Co., Inc., Clifford O. Boren and Delta M. Boren for a stay of judgment made and filed this day, and for stay of execution of such judgment, and to fix and determine the amount of a supersedeas bond on appeal be, and is, denied.

Done in Open Court December 7, 1955.

/s/ WM. C. MATHES,
U. S. District Judge

Approved as to Form pursuant to Local Rule 7(a) this 8th day of December, 1955.

TORRANCE A. WANSLEY,
/s/ By JOHN A. BRANT [80]

Acknowledgment of Service attached. [81]

[Endorsed]: Lodged December 9, 1955. Filed December 12, 1955.

[Title of District Court and Cause.]

AFFIDAVIT OF CLIFFORD O. BOREN AND
DELTA M. BOREN

United States District Court,
Southern District of California—ss.

Clifford O. Boren and Delta M. Boren, each being first duly sworn, depose and say:

In response to the order of the above-entitled Court made and entered December 7, 1955, Clifford O. Boren President, Clifford O. Boren Contracting Co., Inc.; Delta M. Boren, Vice-President, Clifford O. Boren Contracting Co., Inc.; and Clifford O. Boren Contracting Co., Inc., and each of them, respondents, appeared before Special Agent Lloyd M. Tucker on Thursday, December 8, 1955 at 10:00 o'clock, a.m., at 3755 Sixth Avenue, San Diego, California, and produced the records called for in the summons attached to the petition herein, and then and there gave testimony with respect thereto as required by the summonses. [82]

Respondents, and each of them, respectfully declined, on advice of counsel, to permit the examination, copying, or photostating, of the records so produced.

Respondents intend to appeal the order made and entered by this Court December 7, 1955 to the United States Court of Appeals for the Ninth Circuit. Respondents were advised by their counsel that this Court had determined that said order was not a final and appealable order. Respondents were also advised that for an effective appeal to be taken a final order, adjudging respondents in civil contempt of this Court would have to be made.

The sole reason for respondents' refusal to permit the examination, copying, and photostating said records is to enable them to appeal to the United States Court of Appeals for the Ninth Circuit.

/s/ CLIFFORD O. BOREN

/s/ DELTA M. BOREN

Subscribed and sworn to before me this 13th day of December, 1955.

[Seal] /s/ MARY JOAN TRUEBLOOD,
Notary Public in and for said County of San Diego,
State of California. [83]

[Endorsed]: Filed December 12, 1955.

[Title of District Court and Cause.]

MINUTES OF THE COURT

Date: Dec. 13, 1955, at San Diego, Calif.

Present: Hon. Wm. C. Mathes, District Judge;
Deputy Clerk: P. D. Hooser; Reporter, Don P. Cram; Counsel for Plaintiff: E. R. McHale; Counsel for Defendants: John A. Brant.

Proceedings: For hearing on order to Clifford O. Boren and Delta M. Boren to appear and show cause why they should not be held in civil contempt for failure to comply with order entered Dec. 5, 1955.

Attorney McHale states that respondents appeared and testified, but did not produce the things they were required to produce, and refused so to do.

Transcript of proceedings of Dec. 8, 1955, is filed as Gov't Ex. 1 in this hearing.

Court Orders that the respondents appear here at 2 o'clock this afternoon, petitioner will appear also, and that respondents bring with them the records called for in the summonses, and then deliver to petitioner for examination, copying, photographing, or photostating the records in question.

At 2 p.m. Court inquires of respondents if they have the records described in the summons, and respondents state they have.

Court Orders that respondents now deliver those records into the custody of the Clerk for examination, copying, photographing, or photostating.

Respondent Clifford O. Boren and Respondent

Delta M. Boren both decline to obey the Court's order upon grounds previously stated.

Court Orders Respondent Clifford O. Boren and Respondent Delta M. Boren into the custody of the U. S. Marshal to be by him imprisoned in a jail type institution until the affirmative order of this Court is obeyed.

Court also Finds the corporation guilty of contempt and assesses a fine of \$110 to be paid to the Clerk, and by the Clerk paid to the U. S. Gov't.

Counsel for Gov't will prepare formal order and submit it today.

Attorney Brant moves for a stay of execution and to fix a cash deposit in lieu of supersedeas and requests that such deposit be in the amount of \$1,000.

Court states it will grant motion for stay of execution pending appeal and fix bond in the amount of \$1,000, upon condition that the records here in court be delivered into the custody of the Clerk under seal and that the Clerk keep them under seal pending further order of the Court.

Attorney Brant delivers to the Clerk General Journal, nine sheets, marked for ident., as Respondents' Exhibit A; Cash Journal, marked for ident., as Exhibit B; and General Ledger, marked for ident., as Respondents' Exhibit C; Payroll Records, two sets, marked as Exhibit D; and 120 Checks, cancelled, marked as Exhibit E.

Cash deposit in lieu of supersedeas bond is approved by the Court and filed, not only as a supersedeas bond, but as bond pending appeal.

Notice of appeal is presented for filing. Cashier's Check in the amount of \$1,000 is received by the Clerk from Attorney Brant.

Court Orders respondents released on bail pending appeal and may remain on bail pending appeal.

JOHN A. CHILDRESS,
Clerk

[Title of District Court and Cause.]

CASH DEPOSIT IN LIEU OF SUPERSEDEAS BOND

The respondents, having filed Notice of Appeal on the judgment of this Court made and entered on the 13th day of December, 1955, to the United States Court of Appeals for the Ninth Circuit, herewith deposit with the Clerk of this Court the sum of One Thousand Dollars (\$1,000.00), subject to the orders of the Court, as security that respondents, and each of them, shall prosecute and appeal to effect and shall satisfy the judgment in full, together with costs, interest and damages for delay, if for any reason the appeal is dismissed or if the judgment is affirmed, or shall satisfy in full such modification of the judgment and such costs, interest and damages as the said Court of Appeals may adjudge and award.

The sum so deposited is the property of the respondent Clifford O. Boren Contracting Co., Inc., a California corporation.

The sum so deposited is hereby made subject to the provisions of Rule [84] 8(c) of the Local Rules of the United District Court, Southern Division.

/s/ JOHN A. BRANT,
Attorney for Respondents

United States District Court,
Southern District of California—ss.

On December 13, 1955, before me, the undersigned, a Notary Public in and for said County and State, personally appeared John A. Brant, known to me to be the person whose name is subscribed to the within instrument and acknowledged that he executed the same.

Witness my hand and official seal.

[Seal] /s/ MARY JOAN TRUEBLOOD,
Notary Public in and for the County of San Diego,
State of California.

Examined and recommended for approval as provided in Rule 8.

/s/ JOHN A. BRANT

I hereby approve the foregoing.

Dated this 13th day of December, 1955.

/s/ WM. C. MATHES,
U. S. District Judge [85]

[Endorsed]: Filed December 13, 1955.

[Title of District Court and Cause.]

ORDER

The above matter came on for hearing before the Court, the Honorable Wm. C. Mathes, the United States District Judge, presiding, without a jury, at 10:00 o'clock am., December 13, 1955, the petitioner represented by his counsel, Laughlin E. Waters, United States Attorney, and Edward R. McHale, Assistant United States Attorney, Chief, Tax Division, and the respondents represented by their counsel, Torrance & Wansley and John A. Brant, pursuant to the order of Court of December 7, 1955, and it appearing to the satisfaction of the Court that the respondents, and each of them, did appear before the petitioner at the time and place specified, on December 8, 1955, and testify, and bring with them the records called for in the summonses heretofore served on them and attached to the petition herein, but did then and there fail and refuse to produce for examination, copying, and photostating or photographing said records, by petitioner, now

It Is Hereby Ordered, Adjudged and Decreed that the respondents, Clifford O. Boren Contracting Co., Inc.; Clifford O. Boren, President, Clifford O. Boren Contracting Co., Inc.; and Delta M. Boren, Vice-President, Clifford O. Boren Contracting Co., Inc.; and each of them, appear before this Court at 2:00 o'clock p.m., December 13, 1955, and produce for examination, copying, and photostating

or photographing, the records called for in the summonses attached to petition herein and heretofore served upon them.

Dated: December 13, 1955.

/s/ WM. C. MATHES,
U. S. District Judge

Approved as to Form pursuant to Local Rule 7(a) this 13th day of December, 1955.

TORRANCE & WANSLEY,
/s/ By JOHN A. BRANT

[Endorsed]: Filed December 13, 1955. Judgment Docketed and Entered December 15, 1955.

[Title of District Court and Cause.]

ORDER GRANTING IN PART AND DENY-
ING IN PART MOTION TO STRIKE

On Monday, December 5, 1955, at 2 p.m., the above matter came on for hearing on the orders to show cause issued to respondents, the petitioner moved to strike from the Answer to Petition for Orders of Attachment of Person for Civil Contempt filed November 10, 1955, the separate defenses numbered Second to Ninth, inclusive, and the Court, having considered the arguments of counsel, pleadings and memoranda on file, and good cause appearing therefor,

It Is Hereby Ordered, Adjudged and Decreed that petitioner's motion to strike from the answer

the Second and Ninth separate defenses may be and is granted and his motion to strike the other separate defenses, Third to Eighth, inclusive, may be and is denied.

Done in open Court, December 5, 1955.

/s/ WM. C. MATHES,
U. S. District Judge [86]

Approved as to Form pursuant to Local Rule 7(a) this 30th day of December, 1955.

TORRANCE & WANSLEY,
/s/ By JOHN A. BRANT [87]

[Endorsed]: Filed January 4, 1956.

In the United States District Court for the Southern District of California, Southern Division

No. 1780-SD—Civil

LLOYD M. TUCKER, Special Agent, Internal
Revenue Service, Petitioner,

vs.

CLIFFORD O. BOREN CONTRACTING CO.,
INC., etc., et al., Respondents.

JUDGMENT OF CIVIL CONTEMPT AND ORDER COMMITTING RESPONDENTS TO CUSTODY

This matter came on regularly for hearing before the Court, sitting without a jury, the Honorable

Wm. C. Mathes, United States District Judge, presiding, at 2:00 o'clock p.m., December 13, 1955, the petitioner represented by his counsel, Laughlin E. Waters, United States Attorney, and Edward R. McHale, Assistant United States Attorney, Chief, Tax Division, and the respondents represented by their counsel, Torrance & Wansley and John A. Brant, Esquire, and it appearing that said respondents and each of them, pursuant to order of Court, brought with them to Court the records called for in the summonses attached to the petition herein and heretofore served upon them, but in open court failed and refused to obey the order of Court commanding them to produce said records for examination, copying, and photostating or photographing by petitioner,

Now, Therefore, It Is Hereby Ordered, Adjudged and Decreed: [88]

I.

That respondents, Clifford O. Boren, President, Clifford O. Boren Contracting Co., Inc.; Delta M. Boren, Vice-President, Clifford O. Boren Contracting Co., Inc.; Clifford O. Boren Contracting Co., Inc.; and each of them, are in civil contempt of this Court for failing and refusing to produce for examination, copying, photostating or photographing by petitioner the records called for in the summonses attached to the petition herein and heretofore served upon them, to-wit: General Journal, Cash Journal, General Ledger, Payroll Records and Payroll Checks bearing the endorsement of any of

the following named persons: Clifford O. Boren, Delta M. Boren, Marjorie H. Bell, Betty K. McCarthy, and the Clifford O. Boren Contracting Company, Inc., for the period from July 1, 1951, to December 31, 1951.

II.

That respondents, Clifford O. Boren, President, Clifford O. Boren Contracting Co., Inc.; and Delta M. Boren, Vice-President, Clifford O. Boren Contracting Co., Inc.; and each of them, be and are committed to the custody of the United States Marshal to be imprisoned in a jail type institution until the order of this Court is obeyed, and there to remain until they make known to the Court their willingness to obey the Court's orders and until they affirmatively comply with the orders of the Court.

III.

That the Clifford O. Boren Contracting Co., Inc. be assessed a compensatory fine of \$110.00 to be paid to the Clerk of the Court and by him paid to the United States of America.

IV.

That petitioner have judgment for his costs by him expended in the sum of \$., to be taxed by the Clerk of this Court.

Dated: December 13, 1955.

/s/ WM. C. MATHES,
U. S. District Judge

[89]

Approved as to Form pursuant to Local Rule 7(a) this 13th day of December, 1955.

TORRANCE & WANSLEY,
/s/ By JOHN A. BRANT [90]

[Endorsed]: Filed December 13, 1955. Judgment Docketed and Entered December 15, 1955.

[Title of District Court and Cause.]

ORDER GRANTING SUPERSEDEAS

On this 13th day of December, 1955, the parties hereto represented by their respective counsel of record, John A. Brant for respondents and movants, and Laughlin E. Waters, United States Attorney, and Edward R. McHale, Assistant United States Attorney, Chief, Tax Division, attorneys for Lloyd M. Tucker, and

On motion of respondents, and each of them, for a stay pending respondents' appeal to the United States Court of Appeals for the Ninth Circuit, and of respondent Clifford O. Boren and Delta M. Boren for admission to bail, and it appearing to the Court that respondents have prepared a Notice of Appeal and desire to appeal the decision of the Court herein;

Now therefore, good cause appearing,

It Is Ordered, Adjudged and Decreed that the execution of and any proceedings to enforce the judgment made and entered herein on December 13, 1955, be stayed pending the determination of respondents' appeal from such [91] judgment, and

respondents Clifford O. Boren and Delta M. Boren are admitted to Bail pending such determination; provided that respondents deposit with the Clerk of the Court cash in the total amount of \$1,000.00, with a Deposit Statement to be approved by this Court conditioned in accordance with Rule 73(d) of the Federal Rules of Civil Procedure, and that said deposit be made subject to the provisions of Rule 8(c) of the Local Rules of the United States District Court, Southern Division. When so deposited the same shall stand accepted in the place of a supersedeas bond in that amount and operate to supersede the execution of the judgment entered in this action pending the final disposition of the respondents' appeal to the United States Court of Appeals for the Ninth Circuit, and shall be security for the admission of respondents Clifford O. Boren and Delta M. Boren to bail, and security for the fine assessed against Clifford O. Boren Contracting Co., Inc.

It is further ordered that the books and records specified in the summons be, and are hereby, impounded, under seal, with the Clerk of this Court.

Dated: December 13, 1955.

/s/ WM. C. MATHES,
U. S. District Judge

Approved as to Form this 13th day of December, 1955.

LAUGHLIN E. WATERS,
United States Attorney,

EDWARD R. McHALE,

Asst. U. S. Attorney

/s/ By EDWARD R. McHALE,

Attorneys for Petitioner

TORRANCE & WANSLEY,

/s/ By JOHN A. BRANT,

Attorneys for Respondents [92]

[Endorsed]: Filed December 13, 1955.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that Clifford O. Boren, Delta M. Boren and Clifford O. Boren Contracting Co., Inc., and each of them, respondents above named, hereby appeal to the United States Court of Appeals for the Ninth Circuit from a Final Judgment entered in this action on December 13, 1955, adjudging respondents, and each of them, in contempt of the Court.

Dated: December 13, 1955.

TORRANCE & WANSLEY,

/s/ By JOHN A. BRANT,

Attorney for Respondents [93]

[Endorsed]: Filed December 16, 1955.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, John A. Childress, Clerk of the United States District Court for the Southern District of California, do hereby certify that the foregoing pages numbered 1 to 99, inclusive, contain the original

Petition for Orders of Attachment, etc.;

Order to Show Cause re Clifford O. Boren;

Order to Show Cause re Delta M. Boren;

Affidavit of Lloyd M. Tucker (filed in Case No. 1774-SD);

Motion to Vacate Order to Show Cause;

Memo in Opposition to Respondents' Motion to Vacate OSC;

Answer to Petition for Orders of Attachment, etc.;

Affidavit of Lloyd M. Tucker;

Brief in Opposition to Petition;

Memo in Support of Orders to Show Cause, etc.;

Affidavit of John A. Brant;

Findings of Fact and Conclusions of Law;

Motion for Writ of Supersedeas Pending Appeal;

Order;

Order Denying stay of Judgment and Writ of Supersedeas;

Affidavit of Clifford O. Boren and Delta M. Boren;

Cash Deposit in Lieu of Supersedeas Bond;

Order Granting in Part and Denying in Part Motion to Strike;

Judgment of Civil Contempt and Order Committing Respondents to Custody;
Order Granting Supersedeas;
Notice of Appeal;
Designation of Contents of Record on Appeal;
Appellee's Additional Designation of Contents of Record; and a full, true and correct copy of the Minutes of the Court on December 5, 1955; December 7, 1955; which, together with four vols. of reporter's transcript of proceedings had on Monday, December 5, 1955; Wednesday, December 7, 1955; and Tuesday, December 13, 1955; and Government's Exhibit 1 and respondents' Exhibit C, in the above-entitled cause, constitute the transcript of record on appeal to the United States Court of Appeals for the Ninth Circuit, in said cause.

I further certify that my fees for preparing the foregoing record amount to \$2.00, which sum has been paid by appellants.

Witness my hand and the seal of said District Court, this 25th day of January, 1956.

[Seal] JOHN A. CHILDRESS,
 Clerk
/s/ By CHARLES E. JONES,
 Deputy

In the United States District Court for the Southern District of California, Southern Division

No. 1780-SD—Civil

LLOYD M. TUCKER, etc., Petitioner,

vs.

CLIFFORD O. BOREN CONTRACTING CO.,
INC., et al., Respondents.

TRANSCRIPT OF PROCEEDINGS
(Partial Transcript)

San Diego, California, Monday, Dec. 5, 1955

Honorable William C. Mathes, Judge Presiding.

Appearances: For the Petitioner: Laughlin E. Waters, United States Attorney; by Edward R. McHale, Asst. United States Attorney. For the Respondents: Torrance & Wansley, by John A. Brant, Esq., 625 Broadway, Suite 1216, San Diego, California. [1*]

* * * * *

The Clerk: Case No. 1774, Clifford O. Boren, et al. vs. Lloyd M. Tucker.

Mr. Brant: Ready for the plaintiffs in that action, your Honor.

As I understand it, that action is to be held in abeyance or continued until after the decision is rendered in case No. 1780, your Honor, which immediately follows that case on the calendar.

The Court: No, it won't be because I am going

* Page numbers appearing at top of page of original Reporter's Transcript of Record.

to dismiss it for want of jurisdiction. The court has no jurisdiction of an action of that kind. There is a motion to dismiss on file in Case No. 1774, unless there is something else to be said——

Mr. Brant: No, your Honor.

The Court: ——I will grant the motion to dismiss for lack of jurisdiction over the subject matter, and direct the defendant to prepare and settle under Local Rule 7 within five days judgment of dismissal,——

Mr. McHale: Very well, your Honor.

The Court: ——for lack of jurisdiction over the subject matter. And the judgment will not constitute an adjudication on the merits, and will so show. [2]

The Clerk: Case No. 1780, Lloyd M. Tucker vs. Clifford O. Boren Contracting Company, Inc., et al.

Mr. McHale: Ready for the petitioner Tucker, your Honor.

Mr. Brant: Ready for all three respondents, your Honor.

The Court: Very well. You may proceed.

Does that complete the call, Mr. Clerk?

The Clerk: Yes, your Honor.

Mr. Brant: If the court please, I would like to make a short statement before we get into this matter.

The Court: You may.

Mr. Brant: Your Honor, my name is John A. Brant and I have represented the respondents in this action from its commencement until now. On last Friday I received an affidavit and a memoran-

dum in support of the petition. Thereupon it became necessary for me, as one of the attorneys, to file an affidavit in this case, which I have done, and it was filed in this case this morning.

The affidavit relates to more than formal matters, and I feel it is incumbent upon me at this point, and I also feel I have the ethical obligation to request the court's permission to withdraw as attorney in this case since I have filed this affidavit and since it may become necessary, if the court so desires, for me to testify in this case. And I feel that unless both court and counsel agree to my continuance as attorney in this case my request should be granted, your Honor. [3]

Mr. McHale: I take it this is Mr. Brant, yourself, withdrawing as counsel?

Mr. Brant: That is correct.

Mr. McHale: The firm of Torrance & Wansley has filed an appearance, your Honor.

The Court: Are the matters in Mr. Brant's affidavit of a sufficiently controversial nature to——

Mr. McHale: I think they are, your Honor. I don't think they are material to the pleadings, but I think if the court goes into them they are controversial. Of course, I don't care one way or the other, as far as that is concerned. But I think they would be controverted, parts of them.

The Court: Of course, your move is very appropriate and highly ethical, Mr. Brant, but in view of the Government's attitude it would be just a question of about how you feel about it. It isn't as if there were a jury here.

Mr. Brant: I have this morning briefed Mr. Albert Strang, who is an associate in our office, on the case. I do feel that the respondents here in this case, because of my greater familiarity with the matters, would be greater represented if I continued in the case. But I find my ethical position rather difficult. I would hesitate to stand here before this court and argue the truth or falsity of my own testimony. [4]

The Court: The Government deems the matters immaterial to the issues, so I would say it would be entirely up to you, just how you feel about it.

Mr. Brant: I do feel my clients would be better represented, because of the fact that Mr. Strang has only been able to spend a very few hours with the case, if I were permitted to continue as counsel.

The Court: If you feel like continuing, you may do so.

Mr. Brant: Thank you, your Honor, I shall.

The Court: Very well.

Mr. Brant: I understand the first matter is a motion to vacate the order to show cause, your Honor, in which the respondents are the moving parties.

The Court: Very well.

Mr. Brant: Is that your understanding, Mr. McHale?

Mr. McHale: I don't know if it is the first matter. I think it's a question of what the court wants to hear first. The orders to show cause were issued first by Judge Westover and continued over from

time to time until today. The motion to vacate was filed at a later time, your Honor.

The Court: The motion to vacate will be taken up first because if it is granted that disposes of the matter, does it not. That is a motion, in effect, to discharge the order to show cause.

Mr. Brant: That is correct, in at least two material respects, your Honor. [5]

The Court: I take it it is addressed to the sufficiency of the petition itself.

Mr. Brant: Yes, sir.

The Court: I will hear that first.

Mr. Brant: Your Honor, the respondents have moved to vacate the order to show cause on the ground that the petition fails to state a claim upon which an attachment against the respondents, or either one of them, could issue as for contempt, and that it fails to state a claim upon which respondents, or either of them, could be held in civil contempt.

The Court: Now, before you proceed, Mr. Brant, these respondents are Clifford O. Boren and Delta M. Boren—who is the third?

Mr. Brant: The Clifford O. Boren Contracting Co., Inc.

The Court: Are Clifford O. Boren and Delta M. Boren present?

Mr. Brant: Yes, they are, your Honor. Will you please stand?

(Whereupon the two respondents stood.)

The Court: Very well. They appear for the corporation as well?

Mr. Brant: Yes, your Honor.

The Court: You may proceed.

Mr. McHale: May I clarify one thing, your Honor. The respondents are named as such in their corporate capacities [6] in the petition as Clifford O. Boren, president of the Clifford O. Boren Contracting Co. and Delta M. Boren, vice president of the Clifford O. Boren Contracting Co.

The Court: Do they appear here in those capacities?

Mr. Brant: Yes, your Honor, they do.

The Court: Very well.

Mr. Brant: The order to show cause, your Honor, in all three of them addressed to the individual respondents, the two individual respondents and the one corporate respondent, require that they appear in court at a time and on a date stated, and to show cause, if any there be, why an attachment should not issue against the particular respondent as for a contempt, and why the respondent should not be compelled to answer the petitioner's questions and produce books, records, paper and data referred to in said petition. And further why each of the respondents should not be held in civil contempt.

It is the respondents' position, your Honor, that an action for an attachment, or an action to find any one of the respondents in civil contempt is inappropriate at this stage.

This case arises out of three administrative summonses issued by the petitioner Lloyd M. Tucker, who is an agent of the Internal Revenue Service.

It is our position that Mr. Tucker is properly in court—can properly come to court, rather, to seek an order from this court directing the [7] respondents to appear before him and to produce the records for his examination. If he obtains such an order from this court and then if the respondents fail to comply with the court's order, not with an instruction from the petitioner, but if they fail to comply with the court's order then and thereafter the petitioner, Mr. Tucker, may bring an action for civil contempt.

Now, this matter has not been decided, your Honor, under the present section under which Mr. Tucker has issued these summonses. That is Section 7602 of the Internal Revenue Code of 1954. However, under the code section which immediately preceded Section 7602 it was decided that the refusal to comply with a Special Agent's summons or an Internal Revenue Agent's summons issued under a like code section was not in and of itself contemptuous conduct and could not be punished as contemptuous conduct; but failure to comply merely gave rise to the right on the part of the officer issuing the summons to petition for an order to produce.

Now, it was decided in the case of Isidore Wolrich, et al. vs. Naboshek, Gurian & Lindenbaum, a 1949 case in the United States District Court for the Southern District of New York, the citing being 84 F. Supp. 481, the court was called upon to consider the nature of the powers which had been conferred upon the Commissioner of Internal

Revenue and his agents by Section 3614(a) of the Internal Revenue Code [8] of 1939, which section has been incorporated into Section 7602 of the present Internal Revenue Code. And in that case the court stated, and my quotation will be rather short, your Honor,

“Unlike the Collector of Internal Revenue, 26 U.S.C.A., Sec. 3615, the Commissioner has now power of subpoena in his own right. He can merely examine books and records and ‘require’ the attendance of persons having knowledge in the premises. If the party whose attendance is ‘required’ fails to attend, the Commissioner may ask the District Court ‘by appropriate process to compel such attendance, testimony, or production of books, papers, or other data’.” Citing 26 U.S.C.A. Sec. 3633.

And then the court continues,

“A subpoena, subpoena duces tecum, or order to appear and produce is patently an appropriate process. If it is disregarded, then contempt proceedings may ensue. The Collector, however, does not need the aid of the Court to compel attendance or production. If a Collector’s summons is disregarded, contempt proceedings may ensue immediately.”

Citing 26 U.S.C.A. Sec. 3615.

And there is an additional decision in accord with that, “In the Matter of Albert Lindley Lee Memorial Hospital,” a [9] 1953 decision, District Court for the Northern District of New York. This has no official report, but it is contained in the Commerce Clearing House works 53-1 USTC, para-

graph 9266. Now, that was the District Court decision which was not reported. The Circuit Court of Appeals did affirm that decision and the official citation there is 209 F. 2d 122.

Section 7602 of the Internal Revenue Code of 1954, your Honor, consolidated Sections 3614, 3615(a),(b) and (c) and 3632(a)(1) of the Internal Revenue Code of 1939. Your Honor will recall that the Internal Revenue Code of 1954 was a reorganization of the Code, and one of the primary efforts was to consolidate many different sections under one heading.

The consolidation of these various sections into Section 7602 we submit, your Honor, resulted in no material change from the law which previously existed. And this is borne out by the report of the Committee on Ways and Means of the House of Representatives on the Bill H.R. 8300, contained in Report No. 1337, page 436.

It was there pointed out that the only change made in the section according to the committee report was a technical change by the Senate which struck out the words—which was contained in one of the sections—“or any other person having knowledge in the premises” and inserting in the section “or any person having possession, custody, or care of books of account containing entries relating to the business [10] of the person liable for tax or required to perform the act, or any other person the Secretary or his delegate may deem proper.”

The reports point out that this was merely a

technical change and that the consolidation of the sections did not bring about any material change in the law which had previously existed.

Now, as the second point I should like to bring out that the Federal Administrative Procedure Act prevents the imposition of any sanctions upon a party for failure to comply with the administrative summons, for the failure in and of itself.

Now, the Federal Administrative Procedure Act expressly recognizes the right of parties subject to an administrative subpoena to contest the validity of the subpoena in the courts prior to being subjected to any forms of penalty for non-compliance.

Section 1005(c), Title 5 of the United States Code provides in part—and I quote——

“Upon contest the Court shall sustain any such subpoena * * *”

That refers to an administrative subpoena——

“* * * or similar process or demand to the extent that it is found to be in accordance with law, and, in any proceeding for enforcement, shall issue an order requiring the appearance of the witness [11] or the production of evidence or data within a reasonable time under penalty of punishment for contempt in case of contumacious failure to comply.”

Now, it has been held that Section 1005, your Honor, is applicable to a summons issued by a petitioner such as we have here, an Internal Revenue agent.

The Court: Your position is, as I understand it, that that portion of the order to show cause which directs these respondents to show cause why they should not be punished as for civil contempt should be discharged; that they should be called upon to show cause first why they should not produce the records and answers questions as called for in the subpoena.

Mr. Brant: That is correct, your Honor.

The Court: And that if the subpoena be sustained upon that hearing that the order be that within a certain specified time they either produce the records or show cause before the court why they should not be committed for contempt. Is that it?

Mr. Brant: Well, essentially that, your Honor; but here today the petitioner is certainly entitled to ask this court for an order requiring the respondents to appear before him at a date within a reasonable time, a date to be set by the court, to appear and produce the records and to testify before him. [12]

Now on failure to do so then the petitioner has the right to come in and ask that these parties be held in contempt for failure to obey the court's order. It is our position that failure to comply with this administrative summons is not in and of itself contemptuous conduct and cannot be punished.

The Court: I will hear from the Government on that.

Mr. Brant: May I give to your Honor one citation on the last point that I made that this Section

of the Administrative Procedure Act 1005 is applicable to a summons issued by an Internal Revenue Agent, and that decision is *U. S. vs. Aylmer, A-y-l-m-e-r, V. Smith, et al.*, a 1949 decision, District Court of Connecticut, 87 *Fd. Supp.* 293.

Thank you, your Honor.

The Court: This order to show cause directs the respondents to appear and show cause, one, why an attachment should not be issued against him as for a contempt and, two, why he should not be compelled to answer petitioner's questions and produce books, records, papers and data referred to in said petition; and three, further why he should not be held in civil contempt.

As I understand the respondents' motion, it is that the order to show cause should be discharged as to the whys one and three, and this hearing should proceed upon the why No. 2. Is that a fair statement? [13]

Mr. Brant: That is correct, your Honor; yes, sir.

Mr. McHale: I would like to clarify one thing, your Honor: Prior to the enactment of the 1954 Code there was in the 1939 Revenue Code two sections with respect to the production of books and records and requiring persons to testify. One of them was Section 3614 of the Internal Revenue Code of 1939, which had to do with the Commissioner's summons; and with respect to the cases recited by counsel and the provisions of it, counsel is substantially right. There was no contempt and failure to obey so-called Commissioner's sum-

mons. The procedure that was adopted and the courts held should be followed was that upon failure of a witness to obey the summons the Commissioner would apply to the United States District Court for an order directing the witness to do the same thing that the agent's summons asked. Only upon failure of the person to obey the court's order was there a proceeding for contempt. That is under old Section 3614. And there have been very many cases. There is no question about the fact that that was the procedure. There was a case that went up from the Southern District of California within the last couple of years, Chapman vs. Goodman, in the Ninth Circuit, which proceeded on that very basis.

There was, however, another procedure under the 1939 Revenue Code under Section 3615. Section 3615 had to do with the Collector of Internal Revenue and his summons. [14] As your Honor will recall, before the reorganization of the Bureau of Internal Revenue there was quite a difference in the functions of the Collector of Internal Revenue and the Commissioner of Internal Revenue. The Collector had a quite different summons than the Commissioner. And it was a much more powerful summons in that upon failure of anyone to obey the Collector's summons he could proceed before a Commissioner of the United States Court or United States Court itself and as for attachment, writ of attachment to be issued by the court or by the Commissioner to bring the witness before a judge or commissioner immediately. That pro-

cedure has been followed in connection with Collectors' summonses in this district.

In enacting the Internal Revenue Code of 1954 there was no reason to continue the separate functioning; the whole Internal Revenue Service had been reorganized, the functions had been integrated. There now was no longer separate branches of the Collector's and Commissioner's agents. And therefore the enactment in Section 7602 and 7604 of these discovery proceedings, of the examination and inspection of books and records, it followed more closely the old Collector's summons in that Section 7604(b), entitled "Enforcement" reads,

"Whenever any person summoned under Section 7602 neglects or refuses to obey such summons or to produce the books, papers, records or other [15] data or to give testimony as required, the Secretary or his delegate may apply to the judge of the District Court or to a United States Commissioner for the district within which the person so summoned resides or is found for an attachment against him as for a contempt. It shall be the duty of the judge or commissioner to hear the application and if satisfactory proof is made, to issue an attachment directed to some proper officer for the arrest of such person, and upon his being brought before him to proceed to a hearing of the case; and upon such hearing the judge or the United States Commissioner shall have the power to make such order as he shall deem proper, not inconsistent with the law for the punishment for contempts, to enforce obedience to the requirements of the

summons and to punish such person for his default or disobedience."

This action proceeded on September 19, 1955, by the filing of such an application petition. It proceeded before Judge Westover who was then sitting in the Southern Division. Mr. Brant was present in connection with Case No. 1774-SD, representing the Borens and the Clifford O. Boren Contracting Co., and he was present in open court when I made the application to Judge Westover to issue the writs of attachment for contempt. In the alternative I prepared these orders to show [16] cause to bring the persons into court at a time and place certain to show cause why they should not be deemed to be in contempt and require them to answer.

The Court: In contempt of whom and of what?

Mr. McHale: In contempt of this summons of the Special Agent of the Internal Revenue.

The Court: Do you know of any precedent for holding a person in contempt of an administrative official?

Mr. McHale: Well, I think, your Honor, that the contempt might be denominated in the event it is in the presence of the court, it might be called a contempt of court because the procedure as set up requires that the actual hearing be held before the court.

The Court: What I am getting at is that it seems to me that it may be just a difference in somatics here. Suppose the petition were granted today. Wouldn't the order, of necessity, be that these respondents produce and testify as called for,

or at some future time show cause why they should not be held in civil contempt of court? Wouldn't that be the order?

Mr. McHale: I think, your Honor, that this section contemplates that the persons are brought into court, their books and records, and if the court deems that the application is sufficient that they be then and there directed to produce their books and records. [17]

The Court: Yes, at a certain time and place to be specified in the order; and in the event that they fail to do so that they show cause at some still subsequent time before the court why they should not be committed for contempt, punished for contempt.

Mr. McHale: I doubt, your Honor——

The Court: Or held in contempt. Would you today ask for an order that these respondents be held in contempt and be committed to the custody of the marshal until they do produce?

Mr. McHale: I think your Honor, that your Honor has the power here today, if it deems that the application is sufficient, to require the respondents to produce the books and records today. I mean that seems to me——

The Court: Oh, yes. It is a question of reasonableness of time. But the order would not now be, would it, that they be committed to the custody of the marshal to be by him imprisoned until they comply?

Mr. McHale: Well, if they here and now refuse, I think it would be.

The Court: Yes. But the order you would seek today, I take it, would be that at some time and place in the future to be fixed that they appear before these agents with their books and records as requested and give evidence; and that in the event they fail or refuse to do so that they [18] appear before this court at some future time and then and there show cause why they should not be punished for contempt, or held in contempt.

Mr. McHale: I am amenable to that procedure, your Honor. I believe that the court has little broader powers than that under the section. After all this could have proceeded with an attachment being issued by Judge Westover on the 19th of September. You see, it provides for a summary procedure. They could have been brought before the court the next day.

The Court: That is a method of bringing them before the Court, isn't it?

Mr. McHale: Yes.

The Court: Oh, yes. They could have been subjected to civil arrest, and, in fact, the marshal could have been sent out with an attachment to bring them before the court instantler, in person. But the court didn't choose to do that. The court issued an order to show cause instead; and the substance of the order to show cause is, is it not, that they appear here today in response to the order to show cause and show cause, if any they have, why they should not be required to obey this subpoena.

Mr. McHale: Well, that is the substance of it.

The Court: And that if that be granted that they be directed to obey the subpoena at a time and place to be specified; and that in the event they fail to, or refuse to [19] do so, that they be back again and appear before this court to show cause why they should not be held in contempt.

Would not that be it?

Mr. McHale: It's one way, your Honor. I can see where the respondents could in a case refuse at the time of the order to show cause and they could then and there be ordered held in contempt of court. But as I say, either way, your Honor, wouldn't seem to make much difference.

The Court: The respondents' motion filed October 5, 1955, to vacate the order to show cause is granted to the extent that that portion of the order to show cause which reads, "' * * * why an attachment should not issue against him for a contempt,'" shall be discharged.

Otherwise the motion is denied. And, otherwise, the order to show cause will remain in full force and effect as to why the respondents should not be compelled to answer petitioner's questions and produce books, records, papers and data referred to in said petition, and further why he should not be held in civil contempt, in the event that they shall fail and refuse to comply with the court's order.

Now, you may proceed upon the petition on the theory that that is the order to show cause. I will ask you, Mr. Brant, to prepare and settle under

Local Rule 7 within five days a formal order on your motion embodying those rulings. [20]

Mr. Brant: Yes, sir.

Mr. McHale: On the petition then of Lloyd M. Tucker, your Honor, it was filed on September 19th, the verified petition of Lloyd Tucker, with Exhibit A attached thereto. The respondents have filed a response which they have denominated "an answer."

The procedure in this type of matter, as the Ninth Circuit has said, *sui generis*, it proceeds, I believe, under Federal Rule of Procedure, I think, 8183. However, I think it is contemplated that in the event of any disputes as to the facts that the court of course could take testimony.

Now, I would like to incorporate by reference, or introduce as an exhibit here the Affidavit of Mr. Tucker that he made in Action 1774-SD.

The Court: Do you offer that as—

Mr. McHale: In addition to the affidavits filed in this action which I would like to offer in evidence, I would like to offer his affidavit previously filed in 1774-SD.

The Court: Now, there are two affidavits, plus the verified petition?

Mr. McHale: That is right, your Honor.

The Court: In 1774—

Mr. McHale: That's called the affidavit of Lloyd M. Tucker—

The Court: —filed September 19, 1955, and verified that day. [21]

Mr. McHale: Yes, your Honor.

The Court: And the affidavit of Lloyd M. Tucker filed in 1780, December 1, 1955, and verified the 30th of November.

Mr. McHale: Yes, your Honor.

The Court: And the verified petition,—

Mr. McHale: Yes, your Honor.

The Court: —filed September 19, 1955.

May the two affidavits and the verified petition be received in evidence by stipulation as the direct testimony of the petitioner Lloyd M. Tucker?

Mr. Brant: Your Honor, we would have to ask that these affidavits not be received in evidence, and we would have to ask that the Government bear their proper burden of proving the facts which they have alleged in their petition which are yet in issue.

The Court: Well, I merely suggested it in the interest of saving time. I assume if we take the time to listen to Mr. Tucker, he will get on the stand and say the same things under oath here this afternoon as he has said in the affidavits and the petition. I thought we would save the time, and then let you cross examine him on them if you wanted to.

Mr. Brant: Your Honor, I believe counsel and I can stipulate as to the facts as far as the petition and these affidavits are concerned, and also the facts which we have alleged [22] in our affirmative defense if we have a short opportunity to do so. I think we can short-cut this proceeding very markedly if we would have a short recess for that purpose.

The Court: The court will be in recess subject to call. Let the clerk know when you are ready.

(Short recess)

Mr. McHale: During the recess, your Honor, we have come to an agreement as to the evidence that may go in, that is, with respect to the affidavits and some of these verified pleadings. I will start first by saying that the verified petition and verified answer and the affidavit of Lloyd M. Tucker in No. 1774-SD, filed September 19, 1955, and the affidavit of Lloyd M. Tucker filed December 1, 1955 in this action—when I say the answer I mean the response, the first defense. Now,—

The Court: Just a moment. Let's get that all straight.

Is it agreed that the petition filed September 19th shall go in as the direct testimony of the petitioner?

Mr. Brant: That is correct, your Honor.

The Court: It will be received as Petitioner's Exhibit No. 1 in evidence, pursuant to stipulation.

(The exhibit referred to was marked Petitioner's Exhibit 1 and received in evidence.)

[See pages 3-8.]

The Court: Then it is agreed that the affidavit of Lloyd M. Tucker verified in Case No. 1774, verified September 16, 1955—verified September [23] 15th—is that the one?

Mr. McHale: I don't have the date on my copy, your Honor. The affidavit of Lloyd M. Tucker in opposition to Plaintiff's motion for preliminary in-

junction filed September 19, 1955. I am sorry. My copy doesn't conform.

The Court: Yes. I have it here. It was filed, verified and filed September 19, 1955. Pursuant to stipulation that is received as Petitioner's Exhibit 2.

Mr. Brant: Mr. Tucker would have so testified on the stand. Yes, sir.

The Court: Well, as I understand this entire stipulation it is that he will be deemed to have been called and to have testified on direct examination, to have been sworn and testified on direct examination to the facts set forth in these two affidavits and in the verified petition.

Mr. Brant: That is correct, yes, sir.

The Court: Then this affidavit is Petitioner's Exhibit No. 2 in evidence pursuant to the stipulation.

(The exhibit referred to was marked Petitioner's Exhibit 2 and received in evidence.)

[See pages 11-14.]

The affidavit of Lloyd M. Tucker verified November 30th and filed in Case No. 1780 December 1, 1955, is received pursuant to the stipulation as Petitioner's Exhibit 3. Is that correct?

Mr. Brant: Yes, sir. [24]

(The exhibit referred to was marked Petitioner's Exhibit 3 and received in evidence.)

[See pages 33-36.]

The Court: Now, you may wish to cross examine on that.

Mr. Brant: We may wish to cross examine. And I

believe counsel and I have both agreed that we may question, insofar as the affidavits are concerned, the materiality of the affidavits, or relevancy.

The Court: You may move to strike any portion.

Mr. Brant: Yes, your Honor.

Mr. McHale: Move to strike, yes, your Honor.

The Court: Then the petition and the two affidavits, Exhibits 1, 2 and 3, are received pursuant to the stipulation as, pro tanto, the direct testimony, the testimony on direct examination of the petitioner.

Mr. Brant: That is correct.

The Court: Now, there was something in the answer?

Mr. McHale: Your Honor, the respondents have raised separate defenses to the petition. It is the Government's position, of course, that these separate affirmative defenses are insufficient, are immaterial and irrelevant to the issue presented here. However, we have stipulations with respect to certain facts in there if the court gets to that. Now,—

The Court: Well, you may stipulate and then object to the admissibility, of course, of the stipulation. [25]

Mr. McHale: Yes. And then there will be certain objections——

The Court: Or move to strike.

Mr. McHale: Yes. Mr. Brant will go through it, and it is sentence by sentence, your Honor, so it will be a little slow, but I think we can accomplish quite a bit.

Mr. Brant: Your Honor, I might mention first,

I understand counsel to be willing to stipulate in the same manner in which we stipulated on his petition that the first defense to the petition, that is, paragraphs numbered I, II and III on pages 1 and 2 are before the court in the same manner that the petition is before the court.

The Court: That is paragraphs I, II and III of the Answer to Petition for Orders of Attachment of Person for Civil Contempt filed November 10, 1955?

Mr. Brant: That is correct, your Honor.

The Court: Then pursuant to the stipulation the allegations of those three paragraphs are received as the testimony on direct examination of the respondent. Is that it?

Mr. McHale: Yes, your Honor.

The Court: Very well.

Mr. Brant: As to the second defense, I,—

The Court: That will be Respondents' Exhibit A, paragraph I, II and III of the petition, so it will have some identification. [26]

(The exhibit referred to was marked Respondents' Exhibit A for identification.)

Mr. Brant: Your Honor, as to the second and subsequent defenses we have arrived at piecemeal stipulations as to various facts, and I think it would perhaps be better for me to identify the paragraph number and read what has been stipulated to, and then the court may hear counsel's agreement to that. If that procedure is acceptable, that is the procedure I will follow.

The Court: Yes. You may proceed.

Mr. Brant: Paragraph numbered I of the second and separate defense, it is stipulated that

“Agents of the Bureau of Internal Revenue commenced the examination of the Federal income tax returns of Clifford O. Boren and Delta M. Boren for the taxable years 1950 and 1951 on or about November 2, 1953.”

Mr. McHale: So stipulated.

Mr. Brant: As to paragraph numbered III of the second and separate defense it is stipulated that on or about April 28, 1954, Internal Revenue Agent Ford requested that a special agent of the Intelligence Division be assigned to co-operate with him in the investigation.

It is also stipulated that on or about May 11, 1954, Special Agent Lloyd Tucker was assigned to co-operate in the examination of [27] Delta M. Boren for the years 1950 and 1951.

Mr. McHale: So stipulated.

Mr. Brant: In connection with paragraph IV of the same defense, it is stipulated that on or about October 6, 1954, Delta M. Boren, through her attorney John Brant, reported irregularities on the part of former Internal Revenue Agent Ford after he left the Service.

It is also stipulated that on or about—in connection with the same paragraph—October 6, 1954, the case was reassigned to Internal Revenue Agent Forrest P. Calkins, who proceeded from Los Angeles to San Diego to resume the examination of Delta M. Boren for the years 1950 and 1951 on or about October 18, 1954.

Mr. McHale: So stipulated.

Mr. Brant: It is also stipulated that Revenue Agent Charles D. Ford resigned from the service on or about September 10, 1955.

In connection with paragraph VII of the same defense, it is stipulated that Revenue Agent Calkins stated at that time, on or about October 20, 1954, that he wanted to start from scratch.

In connection with paragraph VIII of the same defense, it is stipulated that on or about December 7, 1954, petitioner Tucker and Revenue Agent Calkins commenced the examination of the returns of Clifford O. Boren and Delta M. Boren for [28] the calendar years 1950 and 1951; and that they demanded that the corporation make available to them the books, papers, records and other data of the corporation for the fiscal year July 1, 1951 to April 30, 1952, to be used by them in the examination of the returns of Clifford O. Boren and Delta M. Boren for the years 1950 and 1951. Tucker and Calkins agreed to contemporaneously examine the said books and records for the dual purposes of ascertaining the tax liability of Clifford O. Boren and Delta M. Boren for the calendar years 1950 and 1951; and of ascertaining the tax liability of the corporation for the fiscal year ended April 30, 1952.

During the period December 7, 1954 and July 15, 1955, Tucker and Calkins examined the corporate books for these dual purposes—corporate books and records for these dual purposes.

In connection with paragraph IX, of the same

defense, in the conduct of the examination of the corporation's books and records by Tucker and Calkins, they had available for examination, and did examine, the general journal, cash journal, general ledger, pay roll records, and all of the pay roll checks of the corporation for the period July 1, 1951 to April 30, 1952. Calkins made extensive notes and transcripts from said books and records, and the pay roll checks and records, Tucker and Calkins examined the pay roll records and check and Tucker made abstracts of information from the pay roll records and [29] checks. These examinations were made in connection with the matter of the tax liability of Clifford O. Boren and Delta M. Boren for the calendar years 1950 and 1951 and the Clifford O. Boren Contracting Co., Inc.

Mr. McHale: So stipulated, your Honor.

Mr. Brant: In connection with paragraph X, it is stipulated that during the period between July 11, 1955 and July 15, 1955, Tucker and Calkins again demanded to examine said pay roll records and pay roll checks. In compliance with said demand, the corporation again delivered and made available to Tucker and Calkins the pay roll records and checks.

Mr. McHale: So stipulated.

Mr. Brant: Now, directing our attention to the third and separate defense in paragraph III thereof, it is stipulated that a joint income tax return of Clifford O. Boren and Delta M. Boren for the calendar year 1950 was made and filed on or prior to

March 15, 1951. In the month of January 1954, Clifford O. Boren and Delta M. Boren signed a waiver of the Statute of Limitations for the calendar year 1950, which waiver extended the time for assessment of a deficiency to June 30, 1955.

Mr. McHale: So stipulated.

Mr. Brant: In connection with paragraph IV, under date of March 11, 1955, the Commissioner issued his Notice of Deficiency to Clifford O. Boren and Delta M. Boren for the [30] taxable year 1950.

Mr. McHale: So stipulated.

Mr. Brant: Paragraph V, on June 6, 1955, Clifford O. Boren and Delta M. Boren filed with the Tax Court of the United States a petition for redetermination of their tax liability for the taxable year 1950.

Mr. McHale: So stipulated.

Mr. Brant: Paragraph VI, Clifford O. Boren and Delta M. Boren, and each of them, made and filed income tax returns for the calendar year 1951 on or prior to March 15, 1952.

Mr. McHale: So stipulated.

Mr. Brant: Paragraph VII, under date of March 11, 1955, the Commissioner issued Notices of Deficiencies for Clifford O. Boren and Delta M. Boren for the taxable year 1951.

Mr. McHale: So stipulated.

Mr. Brant: Paragraph VIII, on or about July 22, 1955, the Commissioner assessed against Clifford O. Boren and Delta M. Boren the taxes, interest and penalties proposed to be assessed in said Notices of Deficiencies. There are attached hereto

marked Exhibit "A" and Exhibit "B" true copies of the Statement of Income Tax Due for Clifford O. Boren and Delta M. Boren, showing said assessments. Delta M. Boren has paid the taxes, interest and penalties demanded in said statement. [31]

Mr. McHale: So stipulated.

Mr. Brant: In connection with the fifth and separate defense, page 6 of the answer, it is stipulated—and also in connection with paragraph II—it is stipulated that on July 20, 1955, petitioner Tucker demanded to examine the pay roll records and checks of the corporation. Said records and checks have been examined by both Tucker and Calkins throughout the period of examination and had repeatedly been made available to Tucker and Calkins.

Mr. McHale: So stipulated.

In connection with the sixth and separate defense on page 7, paragraph II thereof, it is stipulated that none of the respondents have requested a re-examination of the corporation's books of account. Neither the Secretary of the Treasury nor his delegate, after investigation, has notified the corporation in writing that an additional inspection is necessary.

Mr. McHale: So stipulated.

Mr. Brant: I believe that is the extent of our stipulations, your Honor.

The Court: Very well.

Anything further on behalf of the petitioner?

Mr. Brant: If the court please, I am informed by Mr. Strang that I erred in one stipulation in

connection with Mr. Ford's resignation. I am told that I stated 1955 instead of 1954. [32]

Mr. McHale: I am sure it wasn't 1955.

The Court: The answer states 1955. The answer alleges 1955.

Mr. Brant: That is incorrect, your Honor. It was September 10, 1954. Is that not correct?

Mr. McHale: Yes.

The Court: That is in the last sentence of paragraph V on page 3 of the answer filed November 10, 1955. You may make the correction on the face of the original by interlineation, if you so desire.

Mr. McHale: Yes, your Honor.

Mr. Brant: Yes, your Honor.

The Court: And initial it and place the date in the margin. 1954 is the agreed date.

Mr. McHale: Agreed, your Honor.

The Court: September 10, 1954 is the agreed date of the resignation of Agent Charles D. Ford.

Mr. McHale: That is correct, your Honor.

Mr. Brant: One stipulation further, your Honor: I believe counsel is agreed that the affidavit which I signed and which has been filed with the court should be before the court in the same manner as Mr. Tucker's affidavits are before the court. That is, I would so testify if called and placed on the witness stand under oath.

Mr. McHale: Reserving objections to the materiality and relevancy. [33]

The Court: You may move to strike.

Mr. McHale: That is what I mean, your Honor,

move to strike; and, also, any particular evidentiary grounds, conclusions and so forth.

The Court: The affidavit, subject to a motion to strike, will be received as Respondents' Exhibit B. That is the affidavit of John A. Brant filed December 5, 1955, and verified the same day.

(The exhibit referred to was marked Respondents' Exhibit B, and was received in evidence.)

[See pages 41-45.]

Mr. McHale: Well, this comes after the evidence, but I suppose some sort of an opening statement should be made here with respect to the nature of this proceeding.

The Court: I have been over the file.

Mr. McHale: Your Honor understands then that the principal issue here—and I think counsel would agree with this—the principal issue here is the Government's right to examine and photograph or reproduce the pay roll checks and look further into the pay roll records for the reason that—on the grounds I believe there is positive indications of fraud. And upon the evidence that has been presented in the record I urge that we have sustained our burden here and that the respondents should be ordered to produce the pay roll checks and records. [34]

The Court: Is there anything further on behalf of the petitioner?

Mr. McHale: Nothing further.

The Court: Do the respondents wish to cross examine Mr. Tucker?

Mr. McHale: There is one thing I wanted to say, your Honor: The Government believes that these separate defenses are wholly irrelevant to the issues here, and we move to strike the separate defenses.

The Court: All of them?

Mr. McHale: All of them, your Honor.

The Court: What defense would the Government conceive of as being available to the respondents in a proceeding such as this?

Mr. McHale: If, your Honor, an examination had been commenced of the taxpayers, that is Clifford O. Boren and Delta M. Boren, brought to fruition, altered and ended completely, then it might be considered that under certain sections of the Internal Revenue Code to re-examine the tax liability of the Borens individually, the Commissioner would have to send them notice. But we maintain that the evidence clearly shows that this is a continuing investigation, that later items of particular fraud had been brought to light, that the investigation never terminated—a continuing investigation. [35]

Furthermore, this is a proceeding against the corporation and Delta Boren and Clifford Boren as officers of the corporation—really a third party—to produce the books and records of the third party; and a defense like that, we maintain, wouldn't be available in the first instance. Most of the——

The Court: Well, let's get the evidence now, the record as to the evidence straight. Is the petitioner now resting?

Mr. McHale: Resting, your Honor.

The Court: Before the petitioner rests, do the respondents desire to cross examine the petitioner on his direct evidence?

Mr. Brant: On his direct testimony, no, your Honor. We may desire to call him under the appropriate rule of the Rules of Civil Procedure and Rule 43(b). We may desire to call him under that rule. But we do not desire to cross examine him at this time.

The Court: Very well. The court will reserve a ruling on the petitioner's motion to strike the separate defenses set forth in the respondents' answer to the petition.

The respondents may proceed now. Is there any further evidence to be offered on behalf of the respondents?

Mr. Brant: Yes, your Honor. I would like to call Mr. Lloyd M. Tucker for a very few questions.

The Court: You may. [36]

LLOYD M. TUCKER

called as a witness on behalf of the respondents, being first sworn, was examined and testified as follows:

The Clerk: State your name, please.

The Witness: Lloyd M. Tucker.

Direct Examination

Q. (By Mr. Brant): Mr. Tucker, you commenced your examination of the returns of Clifford O. Boren and Delta M. Boren on or about October 20, 1954, is that not correct?

(Testimony of Lloyd M. Tucker.)

A. That is correct, sir.

Q. Prior to that date you have not been engaged in the examination of these returns, have you?

A. That is correct.

Q. You were assigned to the examination on or about May 11, 1955, is that correct?

A. That is correct.

Q. On October 20, 1954 did you inform me, as attorney for Mr. and Mrs. Boren, that you intended to conduct a criminal investigation of their returns?

A. I told you that, sir; and I believe it was on that date. If it was not on that date it was on an immediate subsequent date.

Q. Prior to October 20, 1954 do you know whether or not Mr. Forrest Calkins was assigned to the examination of [37]

A. Yes, I am certain that he was.

Q. He was assigned prior to October 20, 1954?

A. Yes.

Mr. McHale: This is covered by the stipulation, your Honor, I think.

The Court: There may be some duplication but I would assume Mr. Brant is attempting to eliminate it wherever possible.

Mr. Brant: I certainly am, your Honor, and shall endeavor to do so.

Q. (By Mr. Brant): Prior to October 20, 1954, do you know whether or not Mr. Calkins was engaged in the examination of Mr. and Mrs. Boren's returns for 1950 and 1951?

A. I think he was not, sir.

(Testimony of Lloyd M. Tucker.)

Q. Do you know, Mr. Tucker, who, if anyone, was engaged in the examination of Mr. and Mrs. Boren's returns prior to October 20, 1954?

A. Yes, I do.

Q. Who were those persons?

A. Henry Miller, an Internal Revenue agent; and Charles D. Ford, who was an Internal Revenue agent at that time.

Q. On October 20, 1954 did you have any official reports of either Mr. Miller or Mr. Ford in your possession; or had you examined any such reports?

A. Yes, I had examined such reports. I recall that I didn't have any papers belonging to or which had been prepared by Mr. Miller.

Q. You did have—pardon me. Go right ahead.

A. And with respect to Mr. Ford, I am certain that I had some memoranda of some type, which I don't presently recall, which had been prepared by him.

Q. And you determined on the basis of this information that you had coming from Mr. Ford to make a criminal investigation of these returns, is that correct?

A. Primarily on the information obtained by Mr. Miller.

Q. But you had no memoranda or any official information as to what Mr. Miller had determined in his examination?

A. Oh, yes, I did.

Q. I thought you testified a moment ago that you did not.

A. What was your question again?

(Testimony of Lloyd M. Tucker.)

Q. Did you have on October 20, 1954 when you commenced the examination, any official records or memoranda of any kind prepared by Mr. Miller in connection with the examination?

A. No, I did not have it in my possession. I had seen them.

Q. You had examined them?

A. Yes. [39]

Q. Mr. Tucker, in the affidavit which you have filed in this proceeding you refer to a certain employee and pay roll checks of this employee. Is this employee a person by the name of Beverly Knapp?

Mr. McHale: Your Honor, I think this matter is confidential and not within the scope of this examination. After all, this is a proceeding investigation and the agent has made his affidavit to the effect that there was such an employee, but I don't think it should be disclosed in this proceeding the source or just the particulars with respect to the employee. We have made this disclosure thus far but I think there should be a limit on the character of the information to be given here.

The Court: Is your objection that it is immaterial?

Mr. McHale: I believe it is immaterial.

The Court: What is the pending question, Mr. Reporter?

(Question read.)

The Court: Would it be material?

Mr. Brant: Yes, your Honor; and I may state its materiality in this manner: One of our primary

(Testimony of Lloyd M. Tucker.)

contentions in opposing the summonses is that Mr. Tucker has examined not once but several times the particular checks and records which he now seeks to again examine under the summonses. And also that there has been a determination of tax liability of all three respondents predicated upon [40] information supplied by Mr. Tucker in his official reports.

The Court: Why don't you ask him if he hasn't examined these checks, all of them, whatever is covered, without asking the name of the person, or the employee?

Mr. Brant: All right.

The Court: Sustained.

Q. (By Mr. Brant): Mr. Tucker, you have examined all of the pay roll checks of the Clifford O. Boren Contracting Company for the period July 1, 1951 to December 31, 1951, have you not?

A. I haven't examined all of them.

Q. Were all of these checks made available to you?

A. As far as I know they were all in your office.

The Court: You had full opportunity to make a complete examination of them previously?

The Witness: Yes, your Honor. They were all there as far as I know.

Q. (By Mr. Brant): Did you have more than one opportunity to examine them, Mr. Tucker?

A. Yes. I had two opportunities.

Q. You specifically requested the check on two different occasions, did you not?

(Testimony of Lloyd M. Tucker.)

A. That is correct, sir.

Q. And they were supplied to you on two different occasions, were they not? [41]

A. That is right.

Q. During the conduct of the examination by you and Mr. Calkins—that is, between the period October 20, 1954 and July 15, 1955—you and Mr. Calkins jointly conducted the examination of the records of the Clifford O. Boren Contracting Company, did you not? A. Yes, that is correct.

Q. All of your examinations were joint, is that not correct? A. Yes, that is true.

Q. Would you estimate, Mr. Tucker, the approximate percentage of your time which was devoted to the examination of these records? That is, when you were present in my office and had the records available. Approximately how much of your time was actually devoted to the examination of the available books and records?

A. Well, that's difficult to state, but I would be glad to state that it was far less than that expended by Mr. Calkins. And I would be glad to explain why.

Q. A small amount of your time was devoted to the examination of the records, is that not correct?

A. Yes, a small amount.

Q. Is it true, Mr. Tucker, that the only records which you in fact desire to examine are the pay roll checks and pay roll records of the contracting company? [42]

A. Yes, those records that would relate in any

(Testimony of Lloyd M. Tucker.)

manner to the pay roll checks, which would be the pay roll records and the checks themselves.

The Court: Do you mean by that answer to withdraw from any portion of the records requested in the subpoena?

The Witness: What is that, sir?

The Court: Do you mean to waive or withdraw the requests for the production of any records specified in the subpoena?

The Witness: No, your Honor. As I recall—

The Court: Then your answer must be, I take it, that you wish to examine all the records specified in the subpoena.

The Witness: That is correct, sir. As I recall—I don't recall exactly what the subpoena said, but all of those records requested would relate in some manner to the checks themselves.

The Court: Or enable you to trace them through the records.

The Witness: That is correct, sir.

Q. (By Mr. Brant): Mr. Tucker, did you state to your attorney, Mr. McHale, that if you were permitted to examine the payroll checks of the contracting company for this period and to have photostatic copies of those checks made that it would be unnecessary to make any further investigation by you of the books and records of the Clifford O. Boren Contracting Company? [43]

A. Well, I can't remember the statement *per se*. If you could refresh my memory as to—

(Testimony of Lloyd M. Tucker.)

Q. Have you ever made such a statement to your counsel?

Mr. McHale: I am going to object to this as being within the attorney-client privilege.

Q. (By Mr. Brant): Have you ever, Mr. Tucker, made a statement——

The Court: I will overrule the objection.

Mr. Brant: Oh, I am sorry.

The Court: It now doesn't appear it was anything confidential. The circumstances don't appear to be confidential. And the witness may claim the privilege, I take it; not the attorney.

The Witness: Will you repeat the question, please?

The Court: I assume he could change his mind, couldn't he? The question here——

Mr. McHale: I think it's immaterial and irrelevant anyway, your Honor. The question here is what he wants at this time and place.

Mr. Brant: Your Honor, in a case of this type it is the burden of the petitioner to show that there is a necessity for the examination.

The Court: That is what I was getting at. Now, is it the purport of your question that he has admitted on some prior occasion that only the cancelled checks were necessary? [44]

Mr. Brant: That is correct.

The Court: You may ask him that.

Answer the question.

The Witness: The only answer I can give to it is that I don't recall making the statement. But if

(Testimony of Lloyd M. Tucker.)

you would enlighten upon your question I would be pleased to try to recall if I did.

Q. (By Mr. Brant): You are acquainted with Mr. Charles D. Ford, Mr. Tucker?

A. Yes, sir.

Q. Do you know whether or not the Special Intelligence Service of the Treasury Dpartment is presently conducting an investigation of the activities of Charles Ford in connection with the examination of the returns of Clifford O. Boren and Delta M. Boren for 1950 and 1951?

Mr. McHale: Your Honor, I believe this question is utterly immaterial and irrelevant.

The Court: What is the purpose of it, Mr. Brant?

Mr. Brant: Your Honor, I feel that the background—we have been in several different proceedings. We have been accused of coming into court without clean hands. And I want to demonstrate that my clients do have clean hands.

The Court: Well, there is no suggestion of that here today that I have heard.

Mr. Brant: I think that is important. [45] And also the purpose for the examination being conducted by Mr. Tucker and Mr. Calkins, I think, is important.

The Court: Well, I understood that the witness admitted that he was conducting it for purposes of investigating possible criminal prosecution.

Mr. Brant: That is correct.

(Testimony of Lloyd M. Tucker.)

The Court: Now do you wish to prove any more than that?

Mr. Brant: We are concerning ourselves somewhat with the question of abuse of authority under this section, your Honor. And I think that we are entitled to inquire as to motive or possible motive, or facts from which an inference of motive might be made.

The Court: Why don't you ask him that? Ask him about motive. The fact that an investigation is being conducted——

Mr. Brant: I seriously doubt, your Honor—pardon me.

The Court: Probably I don't get the purport of the question. I don't see that it has any bearing. They might have three or four different investigations going on. Is this an investigation about Ford?

Mr. Brant: Yes, your Honor.

The Court: Well, let's assume the worst. Would it matter here?

Mr. Brant: Only from inferences which might be——

The Court: Let's assume that some agent of the Government attempted to extort money from these taxpayers. Would that affect this situation? [46]

Mr. Brant: I think it would in connection with the necessity of the examination, your Honor; and the fact that the examination has been conducted over a long period of time of these taxpayers; and the necessity for the re-examination and possible motives for that re-examination.

(Testimony of Lloyd M. Tucker.)

The Court: Well, if it is a question of good faith—I don't know how we could try the issue of good faith. That's wrapped up in the question of necessity, isn't it?

Mr. Brant: That is correct.

The Court: If the examination is reasonably necessary to the performance of official duty—I suppose that would be the ultimate issue, would it not?

Mr. Brant: Yes, your Honor. I will withdraw the question, your Honor.

The Court: Very well.

Q. (By Mr. Brant): Mr. Tucker, are you acquainted with the notices of deficiency which have been issued by the Commissioner of Internal Revenue under date of March 11, 1955, issued to Clifford O. Boren and Delta M. Boren for the years 1950 and 1951?

A. I am to some extent. The issuance of those notices is not a function of my office. But, generally, I am acquainted with what were issued.

Q. Do you know whether or not they were issued based upon information supplied by you, [47] to any extent?

A. Yes, I know whether they were or not.

Q. Would you say entirely supplied by you or only partially?

A. I would say that generally they were based upon the audit conducted by Mr. Calkins, and in some respects from information which I obtained in the investigation together with Mr. Calkins.

(Testimony of Lloyd M. Tucker.)

Q. Now, the audit that you mentioned, the audit of Mr. Calkins you are referring to is the joint audit made by you and Mr. Calkins?

A. Yes.

Q. Are you familiar, Mr. Tucker, with the notice of proposed deficiency issued by the Commissioner of Internal Revenue to the Clifford O. Boren Contracting Co., Inc., under date of July 15, 1955 for the fiscal year July 1, 1951 to April 30, 1952?

Mr. McHale: I object to that, your Honor. This investigation is with respect to the tax liability of Clifford O. Boren and Delta M. Boren, and the corporation is not involved, except as a witness here, in this proceeding. The notices with respect to the corporation would have no bearing in this proceeding.

Mr. Brant: Perhaps, your Honor, counsel may be right. What I am getting at is that the pay roll checks and records—the pay roll checks [48] that he now seeks have been disallowed as a deduction on behalf of the corporation; and he has also disallowed similar pay roll items for the year 1951 in connection with the individual return.

The Court: Why don't you ask him?

Mr. Brant: I am asking him in this manner to establish some foundation for that later question.

The Court: I think you might as well put the question to him direct in this proceeding.

Q. (By Mr. Brant): Mr. Tucker, do you know whether or not the deductions claimed by Clifford

(Testimony of Lloyd M. Tucker.)

O. Boren or Delta M. Boren for the year 1951, the deductions claimed for salaries and wages, were disallowed in whole or in part by the notice of proposed deficiency? A. In part, yes.

Q. They were disallowed in part?

A. Yes.

Q. Was this disallowance, in part, based upon information obtained by you in the examination of the pay roll records and checks? A. It was.

Q. Since that time that you supplied that information, Mr. Tucker, have you obtained any other information showing that any other particular pay roll checks or deductions should be disallowed for the year 1951? [49]

A. No, not since that time.

Mr. Brant: No further questions, your Honor.

Cross Examination

Q. (By Mr. McHale): Mr. Tucker, you were asked, in the joint examination of books and records of the corporation made in connection with the tax liability of Delta and Clifford Boren, as to the percentage of time you spent in Mr. Brant's office, I believe with Mr. Calkins, in examining those records, and I believe you testified that you spent a much smaller amount of time than Mr. Calkins did. Will you explain your answer and the reasons?

A. Yes, I will try to do that. All the time that was expended by Mr. Calkins and myself in this examination was spent in Mr. Brant's office. The books and records were there, and he required that

(Testimony of Lloyd M. Tucker.)

we make the examination in his office and in his presence.

Now, in that office Mr. Brant had his desk and from the front of his desk there was a small shelf which could be pulled out from the desk. As I recall, it may have been 20 inches by 20 inches. And that was the only space that was provided us in which to work. Now, repeatedly on several occasions we asked Mr. Brant if he would provide us with other space. We told him that this space was **not** adequate. We asked him if he could use the library in his office where we could both [50] work together and spread out the books and papers on which we were working. And his reply to that was always some type of a joke to the effect that "Where could you be more comfortable than this? Where could you find better coffee to drink? Where could you find air conditioning like this?" And he never would provide us with any further space to work.

Now, at the time that I examined these pay roll checks and the records that I did examine, I balanced them on my lap, made piles of them on the floor; I wrote on my knee. And Calkins at that time was using various books, heavy ledgers, journals; he had work papers spread before him. He had the books on the floor part of the time. Some of them he had on his lap. Some of them he put on the little shelf that I referred to. And he was continually either looking on the floor or on the shelf or on his lap trying to reconcile these papers and conduct an audit in that fashion.

(Testimony of Lloyd M. Tucker.)

Q. And Mr. Brant was in the offices or sharing offices or associated with the firm of Torrance & Wansley? A. Yes.

Q. And they had how many offices, and what space, would you say?

A. Well, it's a large suite. I am not certain that I know how many rooms there are. I think that there are four individual offices—perhaps five—plus a reception room. [51] And this library that I referred to is across the hall from Mr. Brant's office—or, that is, across the hall from the firm. I never entered the room. I don't know how big it was.

Q. Mr. Brant then required you to conduct the investigation as best you could in his office in his presence, is that correct?

A. That is correct.

Q. Did Mr. Brant ever deliver to you outside of his custody, that is let you take from his office any of the books, records or checks of the Clifford O. Boren Contracting Company?

A. No, he never did.

Q. And it is your principal purpose in this examination, Mr. Tucker, is it not, to photograph or photostat certain of the pay roll checks to determine the validity of the endorsements on those checks, and whether there have been forgeries of those checks? A. That is correct.

Q. But you have been denied access to those checks—that is, to take them out and have them photographed or photostated, is that correct?

(Testimony of Lloyd M. Tucker.)

A. That is correct.

Q. Now, with respect to the notices of deficiency against Clifford O. Boren and Delta M. Boren [52] for the years 1950 and 1951, it is true, isn't it, Mr. Tucker, that the notices of deficiency had to be sent out in June 1955 because the taxpayers would not execute further waivers of the statute of limitations? A. Yes, that's right.

Q. And the same is true with respect to the corporation? A. That is correct.

Mr. McHale: That's all.

Redirect Examination

Q. (By Mr. Brant): Mr. Tucker, those notices of deficiency were not sent out in June 1955 when the statute as extended voluntarily by the taxpayers were extended, but were in fact sent out in March 1955, is that not correct?

A. Some of them were.

Q. Isn't it the fact, Mr. Tucker, that the affidavit which is referred to in your affidavit which was filed in this court in this proceeding, this employee's affidavit, is it not the fact that that affidavit was obtained on March 16, 1955?

A. Are you referring to—

Mr. McHale: Which affidavit?

Mr. Brant: The employee's affidavit referred to in Mr. Tucker's affidavit. [53]

Q. (By Mr. Brant): And prior to July 15, 1955, when you completed your examination of the corporate return?

(Testimony of Lloyd M. Tucker.)

A. I can say this, that it was prior to July 15th. But without referring to certain records which I have on the bench there——

Mr. Brant: Would you make reference to those records. I think it is important that we have the date of that affidavit.

Or is that within our stipulation, counsel?

Mr. McHale: I think it might be.

Mr. Brant: I think it is.

As I recall it, it is within the stipulation and I withdraw the question.

The Court: The stipulation as to when the witness first learned, when the petitioner first learned—

Mr. Brant: About this employee's affidavit. He refers to an employee's affidavit, and in the affidavit which I filed I recite, "I have examined the affidavit—" as I recall—"I have examined the affidavit and it bears the date March 16, 1955." Will you confirm that, counsel? If it is, I will withdraw the question.

Mr. McHale: I think that is correct. I can't find it offhand.

The Court: That's the means whereby the petitioner learned of the alleged fraud? [54]

Mr. McHale: Yes, it is March 15, 1955.

The Court: That is the means whereby the petitioner learned of the facts which give rise to the necessity of the re-examination of the pay rolls here?

Mr. Brant: That's correct. And also the fact that he had examined, did examine them after that

(Testimony of Lloyd M. Tucker.)

date. That is the date that becomes important for that reason.

Q. (By Mr. Brant): Mr. Tucker, my desk is pretty large, isn't it?

The Court: You don't need to go into that.

The Witness: Yes.

Mr. McHale: That's an ambiguous——

Mr. Brant: I want to point out that he had available to him——

The Court: Some taxpayers make the examiners very comfortable and others make them very uncomfortable. That's all a part of their work.

Mr. Brant: I don't think Mr. Tucker would deny that he was made comfortable.

Q. (By Mr. Brant): Is that not the fact, Mr. Tucker?

A. Well, it depends on what you mean by that, Mr. Brant.

Q. Did you ever request of me, Mr. Tucker, to take any of these books and records out of the office?

The Court: There is no complaint here about past examination, is there. These things don't turn upon social niceties, as I see it. [55] The agent uses the power, if he wants to,——

Mr. Brant: That is correct.

The Court: ——that the law gives me whether the taxpayer is agreeable about it or not.

Q. (By Mr. Brant): Mr. Tucker, in issuing the three summonses which you have issued and which are the basis for your present action, was one of

(Testimony of Lloyd M. Tucker.)

the purposes that you had in mind at that time assisting in any manner the preparation of a criminal case against Clifford O. Boren and Delta M. Boren in connection with their returns for 1950 and 1951? A. Yes, it was.

Q. Mr. Tucker, do you have in your possession here in court the notes and transcripts which you made from the books and records supplied by the Clifford O. Boren Contracting Company in connection with the pay roll checks?

A. Yes, sir, I do.

Q. Would you permit me to examine them, please?

Mr. McHale: I object to this, your Honor. This is confidential. This is a matter garnered by the agent in his investigation. It is not relevant or material to any part of the inquiry here.

The Court: What would be the purpose of it?

Mr. Brant: Your Honor, I wish to demonstrate by the notes and transcripts which Mr. Tucker [56] made of the taxpayer's books and records, I wish to demonstrate in part the nature and extent and scope of his prior examination of these records, and to demonstrate that his present examination is not necessary.

And on the issue of privilege I call to the court's attention that the notes and transcripts which I have asked him for are information which he obtained from the taxpayer's books and records, so they could hardly claim confidential privilege on those.

(Testimony of Lloyd M. Tucker.)

The Court: Well, I am not interested in claims of confidential privilege. I am interested in the claim of materiality. As I understand it, what the petitioner here wants is to have photostatic copies of these endorsements and, I assume, to submit them to handwriting experts with exemplars to determine whether or not the people who allegedly endorsed the checks did in fact endorse the checks. That is my understanding of it. And my understanding of it, as a matter of common knowledge, I assume, though I would want to ask him that, the other documents desired are for the purpose of auditing, in a sense tracing the carrying of these checks through the records of the company to see whether, for example, they were in fact charged to the salary account and so forth—pay roll.

Mr. Brant: Of course that is absolutely true, your Honor. He is directing himself specifically as to desiring these [57] photostats. But my burden must necessarily be broader than that. I must attack his entire examination to show that it itself is unnecessary. My question was directed to that, your Honor.

The Court: If he had them twice available the burden is on the petitioner to show a necessity for a third examination.

Mr. Brant: That's right. I will withdraw——

The Court: Now, if he has made photostatic copies he has this information. If you want to show that, why,——

Mr. Brant: I do desire to know the nature of

(Testimony of Lloyd M. Tucker.)

the transcripts of information that he and his associate Mr. Calkins took from these books and records.

The Court: Do you contend that he had photostatic copies made?

Mr. Brant: I do not contend that he has photostatic copies, but I would speculate that he has copies of every bit of information on the checks. That is pure speculation.

The Court: Why don't you ask him that? We would invade his private papers, as we would yours, only as a last resort. Ask him if he doesn't have it. I would assume the same thing. He must have been doing something with them all the time he had them.

Q. (By Mr. Brant): Mr. Tucker, how much information did you extract from the pay roll checks of the Clifford O. Boren [58] Contracting Company? Would you tell us generally what information you took off the checks?

A. Well, in answering that question I would have to restrict it to only the checks that I examined and only as to those checks from which I did extract information.

Q. All right. What information did you extract?

A. All right. From certain checks I extracted the date of the check, the name of the payee of the check, the bank endorsement of the check, and the names of the individuals appearing on the reverse side of the check.

(Testimony of Lloyd M. Tucker.)

Q. Was there any other information on that check?

A. Excuse me. The amount, of course.

Q. Sir? A. The amount, of course.

Q. Was there any other information on the checks that you examined other than what you have obtained? The check that you were just referring to. What other information would there be on the check? A. Oh, the name of the bank.

Q. Did you obtain the name of the bank?

A. No, I didn't.

Q. You never obtained the name of the bank upon which the check was drawn?

The Court: Do you mean did he make a note of it?

The Witness: Well, the bank account——

Q. (By Mr. Brant): Do you know the bank on which these checks were drawn?

A. Yes, I am certain that I do. There were several bank accounts, but as I recall these were drawn on the Bank of America at North Park in San Diego.

Mr. Brant: I have no further questions, your Honor.

The Court: Mr. Clerk, would you place the subpoena in front of the witness.

(Whereupon the document was placed before the witness.)

The Court: I notice, Mr. Tucker, that the subpoena calls for, I believe, five classifications of

(Testimony of Lloyd M. Tucker.)

documents. One is the daily journal. The second is the cash journal. The third is the general ledger. The fourth is the pay roll records. And the fifth is the pay roll checks. I have heard quite a bit said as to the necessity of the production of pay roll checks, but what is the basis for the necessity of the production of the other four items?

The Witness: Well, it would be this, your Honor: to ascertain definitely that any particular check was in fact charged in the records of the company. And that check should then be charged—I mean should be traced into the pay roll record and then from the pay roll record, which is only a subsidiary record, into the general records of the company for the purpose of determining to a finality if that check or like checks were actually charged to expense. [60]

The Court: How would the cash journal be involved, or the general journal?

The Witness: I couldn't say, sir, what these particular records—the cash journal would reflect the disbursements and receipts of cash.

The Court: These are checks, and I would assume they would be charged directly from the pay roll ledger, or whatever the pay roll record is, directly to some general ledger account, some general ledger expense account, without going through the general journal or the cash journal.

The Witness: Yes.

The Court: I was trying to think of some con-

(Testimony of Lloyd M. Tucker.)

tingency that would make the cash journal or even the general journal necessary.

The Witness: Well, Mr. Calkins would be far better qualified to answer that particular question because he has examined those records in far more detail than I have.

The Court: Very well. Would you want to call Mr. Calkins?

Mr. McHale: I think Mr. Calkins could answer that question better.

The Court: Are there any further questions of Mr. Tucker?

Mr. McHale: Yes. I have one further question, your Honor, with respect to the last series of [61] questions.

Recross Examination

Q. (By Mr. McHale): Mr. Tucker, isn't it true that notices of deficiency are issued by the Commissioner of Internal Revenue?

A. Yes, that is correct.

Q. And if the statute of limitations were running, say, in June of a year, the recommendations would have to be made several months before that by the agent in the field so proper processing could be made to various departments of the Internal Revenue Service.

A. They would have to be made in advance.

Mr. McHale: That's all.

The Court: Mr. Tucker, did you have the knowledge of the facts in this employee's affidavit as

(Testimony of Lloyd M. Tucker.)

early as March, and you did not terminate your examination until July?

The Witness: We first examined the checks for the first time in February and based on certain information obtained from those checks we conducted further investigation in that particular regard. And then it was in March—counsel said on March 16th, and that sounds correct—that we obtained certain testimony with respect to the certain pay roll checks which at that time then made it apparent to us that further investigation along those lines would be needed.

Now, between March and July when we again requested those checks, without referring to my records I can't say [62] what happened. I do know that I was out of the state for a period of weeks. And as I recall, Mr. Brant was ill for some time. And the delay was occasioned by Mr. Brant not being available or Mr. Calkins not being available or myself. I was gone for some six weeks.

The Court: When did you complete your second resort to the pay roll checks, your second examination, now?

Mr. McHale: Your Honor, it wasn't completed. The stipulation which was read here today was the fact that in July they asked again to see these checks and were refused. And this action, the issuance of the subpoena took place, I think, as a consequence thereof.

Mr. Brant: I must correct that statement, counsel. On July 11, 1955—and this was our stipula-

(Testimony of Lloyd M. Tucker.)

tion—Mr. Tucker requested all the payroll checks and payroll records on July 13, 1955. I delivered to Mr. Tucker and Mr. Calkins the pay roll records and pay roll checks that are now being sought. And that is our stipulation, if you will refer back.

The Court: How long did they have them after that?

Mr. Brant: I delivered them to them and they stated that they wanted copies of them, and I informed them that I could not consent to their being permitted to make copies at that time; and as I recall Mr. Tucker and Mr. Calkins stated to me, well, they didn't need to examine them then.

The Court: Now when last before that had [63] the agents had possession of the pay roll checks?

Mr. Brant: I couldn't particularize a date, your Honor, for this reason: They were brought in about February of 1955, they were brought into my office and remained there for a considerable period of time; and they were making examinations.

Now, I do know on several days they devoted themselves almost exclusively to the examination of the checks and the pay roll records and the supporting ledgers. I cannot particularize the exact date, your Honor.

The Court: Will the Government accept counsel's statement as testimony, as supplementing his affidavit?

Mr. McHale: As supplementing his affidavit, yes, your Honor.

Mr. Brant has said that possession was given of

(Testimony of Lloyd M. Tucker.)

these checks. Just to clarify—and I think you testified as to this before—but isn't it true that you were never given outright possession of these checks; you were only permitted to examine them in the offices of Mr. Brant? You were never permitted to take them outside or copy or photostat them?

The Witness: That is correct.

Mr. McHale: And that this examination and the tax liability of Delta Boren and Clifford Boren with respect to either criminal or civil fraud is still continuing and has not terminated? [64]

The Witness: That is true.

Mr. McHale: And you made demand in July for the checks to copy or photostat and that has been refused and been refused since, is that correct?

The Witness: That is correct.

Mr. McHale: That is all, your Honor.

The Court: Anything further, Mr. Brant?

Mr. Brant: Nothing further from this witness, your Honor.

The Court: Very well. You may step down, Mr. Tucker.

(Witness excused.)

The Court: Does the petitioner wish to call Mr. Calkins? Oh, the respondents are proceeding now.

Mr. Brant: I hadn't felt it necessary to call Mr. Calkins. Well, yes, I will call Mr. Calkins, please.

The Clerk: State your name, please.

FORREST P. CALKINS

called as a witness on behalf of the respondents, being first sworn, was examined and testified as follows:

The Witness: Forrest P. Calkins.

Direct Examination

Q. (By Mr. Brant): Mr. Calkins, you have examined the pay roll checks and pay roll records of the Clifford O. Boren Contracting Company for the period July 1, 1951 to December 31, 1951, have you not? [65]

A. Well, I have examined them in part, sir.

Q. You have made an examination of them, is that correct?

A. Of some of them, yes, sir.

Q. Have you examined the general ledger in connection with those checks, general ledger and pay roll account?

A. I believe I have, yes, sir.

Mr. Brant: No further questions, your Honor.

The Court: You may, of course, cross examine this witness. I assume you proceeded on that assumption, pursuant to Rule 43(b).

Cross Examination

Q. (By Mr. McHale): Mr. Calkins, I will show

(Testimony of Forrest P. Calkins.)

you the summons that was issued by Mr. Tucker, Exhibit A to the petition, and ask you how the cash journal would be involved in the matter of his pay roll checks. Notice that the cash journal is called for.

A. Well, the cash journal in the Clifford O. Boren Contracting Co. was a combined cash receipts and cash business, your Honor. The journal reflected both moneys received and disbursements of cash during the conduct of business. Therefore, to trace, say, any particular pay roll into the expense account it would be necessary to follow that check through the individual pay roll sheet into the pay roll reconciliation for the particular week or pay period onto the cash book, and [66] through that, the monthly posting into the expense ledger sheet.

Mr. McHale: Thank you.

The Court: Were the checks treated as cash?

The Witness: Well, we refer to cash, your Honor. It's cash or check. It's a disbursement of moneys.

The Court: Combined cash journal and check register?

The Witness: Yes, sir, it would be considered that.

The Court: How would the general journal be necessary to your examination, your further examination?

The Witness: Only in the event any adjustments were made through a general journal to the pay

(Testimony of Forrest P. Calkins.)

roll accounts or wages accounts; that is, either additions to that account or any reductions of the total expense to the——

The Court: General journal entries?

The Witness: Yes, usually correcting or adjusting entries.

The Court: Is there anything further of Mr. Calkins?

Redirect Examination

Q. (By Mr. Brant): Mr. Calkins, in making your examination of the payroll account of the Clifford O. Boren Contracting Co. for this period, did you examine the cash journal?

A. The cash journal? Yes, sir, I did.

Q. And did you examine the general journal?

A. Yes, sir, I did.

Q. And you have already testified you examined the general ledger, as I recall.

A. Yes, sir.

Mr. Brant: No further questions, your Honor.

Mr. McHale: That is all, your Honor.

The Court: You may step down, Mr. Calkins.

(Witness excused.)

Mr. Brant: Your Honor, at this time I would like to introduce into the evidence a letter bearing date of October 19, 1955, and signed by Mr. Edward R. McHale.

Mr. McHale: I object to the introduction of this, your Honor. This is irrelevant, incompetent and immaterial; and it was in an effort made between counsel at one time to settle this proceeding

by way of compromise—that is, to take certain of these records, photostat them under some method agreeable to both of us; and the letter was written by me, as counsel, to Mr. Brant, as counsel, with respect to a possible compromise of this matter.

The Court: Will you hand it to the clerk?

Mr. Brant: Yes, your Honor.

(Whereupon the document was handed to the court.)

The Court: The objection is overruled. It may be received as Respondents' Exhibit next in order.

The Clerk: That is C, your Honor. [68]

(The exhibit referred to, marked Respondents' Exhibit C, was received in evidence.)

RESPONDENTS' EXHIBIT "C"

United States Department of Justice

United States Attorney, Southern District of California, 600 Federal Building, Los Angeles 12.

Address reply to United States Attorney and refer to initials and number ERMcHank Tax Division.

Torrance & Wansley
Attorneys at Law

October 19, 1955

1216 Bank of America Bldg., San Diego 1, Calif.

Attention: John A. Brant, Esq.

Re: Lloyd M. Tucker, etc., vs. Clifford O. Boren
Contracting Co., Inc., etc., et al., No.
1780-SD Civil.

Dear Sirs:

With respect to your letter of October 12, 1955, we are in agreement with you that it would be to

the best interest of your clients and the Government to avoid further proceedings through the Courts with respect to the production of certain books and records of the Clifford O. Boren Contracting Co., Inc.

We would be agreeable to preparing such an order as you suggested in your letter of October 12, 1955, with respect to the payroll checks, which are the documents Mr. Tucker wishes to examine, providing that an opportunity be given the Government to reproduce the checks either photographically or through some photostatic process. We would be willing to stipulate that the copying be done either through the Clerk of the Court or an impartial commercial photographic or photostatic company, if you do not wish to entrust the checks to the custody of the Government for the purposes of copying only.

If this is agreeable to you, please advise us of the method of copying agreeable to you and we will prepare a stipulation and order to that effect. As we understand it, the copying of payroll checks, once accomplished, will make unnecessary any further investigation by Agent Tucker into the books and records of the Clifford O. Boren Contracting Co., Inc., and actions No. 1780-SD and No. 1774-SD may be dismissed by stipulation of counsel.

Very truly yours,

Laughlin E. Waters,
United States Attorney
/s/ Edward R. McHale,
Assistant U. S. Attorney

Mr. Brant: The respondents now rest, your Honor.

The Court: Is there any rebuttal?

Mr. McHale: Yes, your Honor. With respect to this letter which has been received in evidence, I suppose there is nothing—since your Honor has admitted it into evidence—for me to do but to testify briefly with respect to the circumstances surrounding it.

The Court: Will the respondents accept Mr. McHale's recently made statement with respect to this letter as his testimony?

Mr. Brant: Yes, your Honor, certainly.

Mr. McHale: I think that will take care of it, your Honor.

The Court: Any further rebuttal? Does the petitioner rest?

Mr. McHale: Excuse me one moment, your Honor.

That is all. We rest, your Honor.

The Court: Both sides rest?

Mr. Brant: Yes, your Honor.

The Court: I will hear from the respondents.

Mr. Brant: Your Honor, the respondents object to the summonses on several grounds, a number of which have been alluded to here, but I would first generally like to state [69] the grounds and go into a more detailed consideration of them.

Section 7602 of the Internal Revenue Code of 1954, under which these summonses have been issued, authorizes an examination of a taxpayer's books—not necessarily "the" taxpayer's, but "a" tax-

payer's books—for the purpose of ascertaining a tax liability; and then certain other purposes are mentioned but they are not at issue at the present time. The section says,

“For the purpose of ascertaining the correctness of any return, making a return where none has been made, determining the liability of any person for any Internal Revenue tax or the liability at law or in equity of any transferee or fiduciary of any person in respect of an Internal Revenue tax, or collecting any such liability, the Secretary or his delegate is authorized—” to examine and to take testimony.

We submit first, your Honor, that the tax liability of Clifford O. Boren and Delta M. Boren has been ascertained. The Commissioner of Internal Revenue, in connection with the years 1950 and 1951, has made a determination of their tax liability, and as a matter of law that determination is *prima facie* correct. Not only has he made a determination of the tax liability but he has also disallowed salary deductions of Clifford O. Boren and Delta M. Boren and has [70] asserted a fraud penalty. The period of limitations as to the returns of Clifford O. Boren and Delta M. Boren for 1950 and 1951, and as a matter of fact, also for the contracting company for its fiscal year, have expired.

The statute under which these examinations are sought to be made, and particularly Section 7605(b), prohibits unnecessary examinations. The Section 7605(b) is headed “Restrictions on Examination of Taxpayer.” This section provides that “No tax-

payer shall be subjected to unnecessary examination or investigations, * * *." That is the first provision of that section.

Now, we submit that the examination in this case is unnecessary. The books and records which they now seek to examine under these summonses were available to the present petitioner here. He did in fact make an examination of them. He didn't fully utilize the available opportunity which he had, but the records were made available to him. The primary records which he desires to examine are the pay roll checks and records, and they were made available to him on more than one occasion, and he has testified that he made notes and transcripts—rather detailed notes and transcripts, as I recall. And we submit that the examination, therefore, is unnecessary.

Also,—and I think this is borne out particularly by [71] Mr. Tucker's affidavit which has been filed in this case—the summonses that have been issued are unreasonable in scope.

Now, this is a third party examination. This is not an examination of the taxpayer whose tax liability is being investigated, as counsel has properly pointed out. They have examined these records most carefully. They know particularly and specifically what books and records they want. They want the pay roll checks of this employee. That is what they want. And I think you can read the affidavit which they have filed and that is just what they want, plus, in addition, if they happen to find something else from this examination, that would be fine. I

submit they know particularly and specifically the records which they want and they should be required to particularize those records in the summonses. They are not entitled to again make a broad sweeping examination as they seek to do under the present summonses.

And, also, I would like to point out again that Mr. Tucker had considerable opportunity to examine these records. They were available for a period of time running between October 20th of 1954 and July 15th of 1955, a rather considerable period of time. The particular times are contained in my affidavit. Mr. Tucker differs with me somewhat in his affidavit. But in all events he had a considerable period of time to devote himself, if he desires so to do, to the examination of these records. And he failed to do so, [72] apparently, and now seeks again to go through them.

The Court: Should the agent be required to think of all potentialities whenever he makes an examination?

Mr. Brant: Well, your Honor, I think the answer to that question is yes; and the answer to it is yes for this reason: Again referring back to this Section 7605(b), and I already mentioned to your Honor the first prohibition that a taxpayer should not be subjected to unreasonable examination, and then the second one goes on and says, “* * * and only one inspection of a taxpayer’s books of account shall be made for each taxable year unless the taxpayer requests otherwise * * *” and we have not requested that, as we stated in our stipulation—

“* * * or unless the Secretary of his delegate, after investigation, notifies the taxpayer in writing that an additional inspection is necessary.”

Now, the stipulation also demonstrates that these things have not been done. So we submit, your Honor——

The Court: The petitioner says here that he never did finish, that he finally went to you, as I understand it, and he had this idea—he was tardy, yes—but he had the idea that he had better photostat these endorsements, and you said no.

Mr. Brant: That is correct. He also has testified, [73] your Honor, that he has obtained no further information since the time that he did examine the checks. He had this affidavit that apparently caused him to be suspicious of the checks. He had this information when he made the examination—had them available, in all events on July 13th. They handed to him the pay roll records and checks as he had requested, and they were presented to him. Had he desired to examine them, why, his opportunity was there.

Of course, now what he is really after is the right to photostat them, and I am going to touch expressly on our views as to his right to photostat them. I am coming up to that point.

The Court: He just didn't think about this one angle, probably. The question, I suppose, is whether he should be required in one sitting to think of all the possibilities; or two sittings.

Mr. Brant: A notice of proposed deficiency was issued in behalf of the corporation. That is covered

in our stipulation. That has been done. That was done. On July 15th his examination stopped. The last day they examined the books and records of the corporation was July 15th. Prior to that time they were conducting this dual examination of the corporate books and records. And they had a number of sittings, I recall. I don't recall specifically the number of days they were there, but they were there for a considerable [74] number of days. We submit the taxpayers shouldn't be required to again subject themselves to an examination merely because the petitioner in this case didn't take advantage of the opportunity which he had. Of course,——

The Court: These are not the taxpayers' records.

Mr. Brant: The Code refers to "a taxpayer." And we submit, your Honor, that under the *Martin vs. Chandis Securities Co.* case in the Ninth Circuit—I have the citation——

The Court: It is in your memorandum?

Mr. Brant: Yes, sir. ——entitles a third party, a very similar situation as this, to make these objections which we are now making.

The Court: I don't suppose there would be any question about that. If anything, the third party should have more force to his objections from being harassed, at least. But I was just thinking of the rule that would require an agent to think of all the possibilities—to make his examination under the implied threat that he couldn't go back and take another look. Lawyers don't labor under that, do they?

Mr. Brant: We do, your Honor.

The Court: I would hate to think that you had to think of all the advisement the second a client came into the office.

Mr. Brant: But if I am faced with the statute of [75] limitations I had better get my complaint. And if a revenue agent doesn't complete his examination within the statutory period he is precluded from making an examination, unless he is prepared to take the affirmative burden of establishing fraud. That is my understanding.

The Court: Has the statute run?

Mr. Brant: Yes, as to all three, your Honor; with this caveat—and I might be anticipating Mr. McHale. In the notice of deficiency they have asserted a fraud penalty. In the petition they made the general assertion that they have reasonable grounds to believe that fraud was committed. If they have succeeded in establishing that probable cause then they have overcome our objection that the statute of limitations has run.

Mr. McHale: I think we have. That is our whole point here.

Mr. Brant: Perhaps they have. The statute has run, and they therefore have the affirmative burden, in order to make another examination, of establishing that probable cause. But even if they establish that probable cause to make the second examination they must of necessity comply with Section 7605(b) and get the Secretary of the Treasury or his delegate, after investigation, to certify in a written

notice that an additional examination is necessary; which they have not done.

Now, on the very interesting point as to whether or [76] not they are entitled to obtain photostatic copies of these records, the statute, your Honor, authorizes the Secretary of the Treasury or his delegate to examine. There is no authority that I have been able to find in Section 6702 that permits them to do anything more than examine. The words "to examine," according to my interpretation of it, indicates an inspection of some type of the records and would not indicate a right to make a seizure of these records. And we submit, your Honor, that a seizure is not authorized. On the pretext of making an examination they are not authorized to make a seizure of them.

Now, in the brief which we have filed I call the court's attention to *U. S. vs. Krans*, 270 F. 578 at 581. That was a District Court decision in which Judge Learned Hand when he was sitting in the District Court, stated in connection with an inspection authorized by the Volstead Act, "* * * It is clear that the right to inspect (the records and papers) did not give the right to seize, and this is enough to require a return of the papers * * *"

We submit, your Honor, that insisting upon photostatic copies is a seizure of these records just as much as if they took the actual records. We submit that is a seizure.

Now, I have also noted in our points and authorities two cases which appear to be contrary. One is *U. S. vs. [77] Sherry*, 294 F. 684. Well, that

case was a seizure that was made with consent or without objection. Here we are objecting.

Likewise, in *Sellmayer Packing Co. vs. Comm.*, a case that came up to the Circuit Court from the Tax Court, and concerned itself with some seized sales slips. The court pointed out that there had been no objection to the seized sales slips at the time of trial; the evidence was cumulative; and they had been able to establish there was an eminent possibility of these records being destroyed. They had a whole history of destroyed records and they had apparently been burned almost under the eyes of the revenue agents—almost that close to them. They knew it. They were able to establish that. And that is an important point. Counsel has stated two cases——

The Court: That would only go to probable cause.

Mr. Brant: That is correct. Counsel cited two cases on the same point. I would like to briefly mention them and then I hope not to further bother the court. In *Lisansky, et al. vs. United States*, 31 F.2d 846,—cited by counsel—at page 851, the court makes this statement which I feel distinguishes the case:

“There was no search or seizure of the books of defendant, nor was their production compelled by any legal process. On the contrary, the defendants voluntarily showed them to the Government agents and left them in their possession for auditing.”

The other citation is *Cooper vs. United States*, 9 F.2d 216 at page 220. The court there stated:

“Government officers, under the applicable rev-

venue law, demanded access to the books and papers of the corporation, in order to verify or discredit the returns it had made, and neither force, threats, nor other objectionable methods were employed. The corporation, without objection, answered and complied with the demand for inspection and examination and aided and participated therein."

The Court: Assume that this does constitute a seizure, or would constitute a seizure, the petition here is an affidavit here and if it shows probable cause the constitution requirements would be satisfied, would they not?

Mr. Brant: I think, your Honor, they would have to show probable cause for the commission of a crime in order to comply with Rule 41 of the Federal Rules of Criminal Procedure of this court, in order to get the search warrant and search and seize it. I submit if the Government wants to face that issue and seek a formal search warrant, that would be something entirely different. But they have not borne the burden of showing probable cause of the commission of a crime in order to justify a search warrant. I submit they have not done that in this matter.

The Court: Aren't you confusing two portions of the [79] Fourth Amendment? The first portion is the right of people to be secure in their houses, and then personal effects against unreasonable searches and seizure will not be violated. Isn't that what you rely upon here?

Mr. Brant: That is correct.

The Court: Now, the warrant for a search—

there is no warrant sought here for a search.

Mr. Brant: That is correct.

The Court: That would only be issued upon a showing of probable cause.

Mr. Brant: That is correct; a search or seizure.

The Court: But the question of reasonableness of a seizure here might turn upon probable cause to believe that what is being seized constitutes evidence of fraud in this case, or evidence of a crime.

Mr. Brant: That is correct, your Honor. They have no authority under this section to make a seizure. In the administration of the Internal Revenue laws if they want to make a seizure, Section 7607(b) of the Internal Revenue Code says, "For provisions relating to searches and seizures see Rule 41 of the Federal Rules of Criminal Procedure."

I submit that if they want to make a search their proper course is just as the statute directs, [80] "* * * See Rule 41 of the Federal Rules of Criminal Procedure," and then proceed accordingly.

I submit, your Honor, that under the authority of Section 7602 they are limited. And this is the scope of their procedure: They are limited to making examinations, and not authorized to make a seizure.

Now, there is only one further point that I would like to make, which was outlined in our points and authorities, your Honor, and that is that they do not have the right—the Government does not have the right to use the administrative summons under this section for the purpose of investigating a possible criminal liability. And Mr. Tucker has

testified that at least one of his grounds for issuing the summonses here was for that very purpose.

The Court: For the purpose of——

Mr. Brant: For the purpose of investigating possible criminal liability rather than a civil tax liability.

The Court: How would that be material?

Mr. Brant: The code section says they are authorized to make an examination to determine the tax liability of a person. There is no mention of criminal liability.

The Court: What does the term “tax liability” comprehend? Does it comprehend the criminal as well as the civil aspect? [81]

Mr. Brant: Your Honor, I would say it would comprehend this, that it would comprehend the actual tax liability. And on the second point I am not quite sure. I think it would also encompass several fraud penalties but would not encompass criminal penalties or criminal sanctions or the investigation of possible criminal sanctions. And Mr. Tucker stated that one of the purposes in issuing these summonses was for the purpose of investigating a possible criminal case. In the decision of the United States vs. O'Connor, 118 F. Sup. 248, which I have mentioned in the memorandum, the court there states, “To encourage the use of administrative subpoenas as a device for compulsory disclosure of testimony to be used in presentments of criminal cases would diminish one of the fundamental guarantees of liberty.”

In that case it was also mentioned in testimony that one of the purposes was the investigation of a possible criminal liability. The court held here that they would not sanction that.

Thank you, your Honor.

Mr. McHale: May it please the court, with respect to this case of the United States vs. O'Connor, that is clearly distinguishable on its facts. The grand jury had returned an indictment and the holding of the court was they couldn't use this proceeding after the return of an indictment, [82] that it was then within the scope of the appropriation for the trial, if necessary, of grand jury subpoenas. But that is not the case here. This has not been presented to the grand jury for indictment. This is a continuing investigation of the tax liability of the Borens, Delta and Clifford Boren. The statute says, "* * * for the purpose of ascertaining the correctness of any return." And that is what they are attempting to do here. And then it goes on to say, "* * * and bears upon their tax liability."

That may mean civil fraud or it may mean there will be an indictment coming out of it having to do with the incorrectness of the return.

As I have tried to keep clear all through this proceeding, this is a proceeding by the special agent with respect to a third party, the corporation, Clifford O. Boren Contracting Co. The Borens are brought in only in their corporate capacities as such.

Judge Hall, in another proceeding which I have referred to in my brief, Tucker vs. Hubner—inci-

dentally that concerns another aspect of this investigation—stated,

“The respondent makes the point that the procedural requirements of 7605(b) were not complied with. The procedural requirements that a second or additional [83] examination of taxpayer’s books can be made only applies only to a second examination of the books of a taxpayer whose tax is in question.”

We are not saying this is the second examination, but merely pointing out what Judge Hall said in his opinion.

“They do not apply to a case, such as here, where the books are those of a third person (Hubner) and not the books of the one whose tax is in question (The Borens). In such case the sole question which can be raised is necessity for the examination under the Chandis case, *supra*. Obviously the ‘taxpayer’ referred to in Section 7605(b) is the one whose return is under investigation. It does not mean a third party who, as here, in the final analysis is merely a witness having in her possession evidence concerning the possible tax liability of some other person or persons.”

I believe that is recorded in 129 F. Supp. 110, and following, your Honor.

The special agent has filed a verified petition in which the only allegation that is denied in the main defense is this part of paragraph III:

“Petitioner has reasonable cause to believe that said taxpayers may have filed false or fraudulent returns with intent to evade the tax or may [84]

have willfully attempted to defeat or evade the taxes imposed by the Internal Revenue Code;" and paragraph XI,

"Respondents Delta M. Boren as Vice-President of the Clifford O. Boren Contracting Co., Inc., and Clifford O. Boren as President of the Clifford O. Boren Contracting Co., Inc., and the Clifford O. Boren Contracting Co., Inc., did each willfully and knowingly neglect and refuse to obey said summonses as required in that said respondents did appear at the time and place set forth in the summonses but did not produce said books, records, papers and data."

It is also denied in paragraph V that "Said books, records, papers and data contain therein entries relating to the business of the aforesaid Clifford O. Boren and Delta M. Boren; said books, records, papers and data are material and relevant to said inquiry."

Mr. Tucker has made his affidavit, and it has been brought out here today, that in March of 1955 of this year he learned that one of the employees carried on the pay rolls performed no services for the company or for the individuals in any respect; that said employee has denied under oath that she filed or caused to be filed the return such as was found reported income from the Clifford O. Boren Contracting Co.; and that, also, certain pay rolls checks issued to her were not endorsed by her, and these pay roll checks carried her endorsement.

And in the other affidavit which was introduced in the other action, the affidavit of Tucker, I be-

lieve he stated that they had evaded, or had cause to believe that there was an evasion of some \$40,000 in income taxes.

The Court: What do you say to this—you move to strike the respondents' second defense that the tax liability of Clifford O. Boren and Delta M. Boren for 1950-51 had been determined. If it had been determined would there be anything open?

Mr. McHale: The tax liability—that is, the civil tax liability, there has been a determination by the Commissioner because the statute of limitations ran. He had to make it or they would have gone free of any tax liability. However, there are two things. There is a six-year statute of limitations in a criminal prosecution. There is no statute of limitations on civil fraud. This investigation started with Tucker and Calkins last December 7th only; that is, just about a year ago, and it continued during January, February, March, through July, when this demand for these checks was finally refused and this summons had to be issued.

The Court: Isn't your answer to that [86] defense not to strike it but to say that it isn't true?

Mr. McHale: I think that's it. It is not true. It is not true insofar as——

The Court: You say it isn't true that the civil tax liability has been determined but the fraud liability or criminal liabilities are open.

Mr. McHale: The civil liability hasn't actually—well, I am not sure of that. I would say that their petition for redetermination of civil liabilities has been filed. But as far as we are concerned

here it is not material to this because once an action has been filed in a tax court with respect to that civil action they have the use of civil process. Certainly Tucker is not using this action in furtherance of any tax court proceeding.

The Court: Now, the respondents' fourth defense, if sustained, would be a good defense, would it not?

Mr. McHale: If they could sustain the allegations perhaps it might be. However, as I read from Judge Hall's opinion, this is an investigation of a third person, and I don't think there is any—except pure unreasonableness—I don't think there is any reason that a third person can restrict an examination of a taxpayer's returns if they require inspection of his books and records.

The Court: It might be oppressive.

Mr. McHale: It conceivably could be, your Honor. [87]

The Court: Now, the sixth defense, notice of additional inspection. You have touched something upon that, but that defense is pleaded, and if true, would be a good defense, would it not, having in mind the last sentence, "The examination sought by the summonses is unnecessary"?

Mr. McHale: I don't think, your Honor, that the third person witness is in a position to raise that. Now, there is some question about that, but—

The Court: This is a response by all.

Mr McHale: All right. Very well. If it was unnecessary I suppose if they could prove it was unnecessary, that would be true. But I think the

petitioner has sustained his burden here of showing, first, this examination never ended——

The Court: But in considering whether or not these are defenses we must bear in mind that the response here is made by the individuals and the corporation.

Mr. McHale: I am sorry. I tend to forget that, except for the fact that it is made by the individuals only—they are brought in here as respondents in their corporate capacities as officers of the corporation; that is, to produce the books and records which they as the officers of the corporation hold. But saying that they could raise that, I feel that we have borne our burden there in any event.

The Court: Now, the next defense, the seventh. "The petitioner lack authority." If that were [88] true that would be a good defense, wouldn't it? The question of collection of a fraud penalty is open, isn't it?

Mr. McHale: It certainly is, your Honor. And the question of their liability under the criminal law is certainly open.

The Court: But as a defense, if sustained, that would be good, wouldn't it?

Mr. McHale: I think if Tucker had absolutely no authority they would be void.

The Court: And the same with the eighth defense; if sustained it would be a good defense, would it not? "The records are not material."

Mr. McHale: With respect to the corporation I think the cases don't permit the third person witness to go into the materiality or relevancy.

The Court: Again we have the individuals here.

Mr. McHale: Yes, we do, but——

The Court: If this summons were issued only to the corporation, it would not lie in the mouth of the corporation to say that the records were immaterial.

Is there anything further?

Mr. McHale: Nothing except to summarize. I did refer to that affidavit of Mr. Tucker in Action 1774, which has been introduced as Government's Exhibit, and on page 2 he says,

“Preliminary investigation of the taxable [89] years 1950 and 1951 of the Borens shows that in excess of \$40,000 of taxable income was not reported by the taxpayers as required by law. No evidence has been discovered to date tending to show that this nondisclosure was due to mistake, inadvertence, or other justifiable or legal reason, or tending to show that it was not done with the purpose and intent to evade and defeat the payment of the taxpayers' income taxes.”

In summation I say that the petitioner has shown that he has reasonable cause to believe, as he alleges in his petition, that they have filed false or fraudulent returns with intent to evade the tax or may have willfully attempted to defeat or evade the taxes imposed by the Internal Revenue Code. And for that reason it is within the power of the court to compel the respondents to produce the records. And it is also within the power of the court to permit the photostating or photographing, perhaps under the the court's supervision of those records.

The Court: What do you say to the contention

that the photographing would constitute a seizure?

Mr. McHale: I believe it wouldn't, your Honor. We cited some cases here where the—admittedly this is a field in which there isn't much law, because I don't think this question—— [90]

The Court: We do it every day, civilly, under Rule 34; compel the production of documents for copying or photographing.

Mr. McHale: Yes. I think that with respect to this sort of proceeding it is almost never used because ordinarily with respect to a trial, tax evasion, say, the summaries prepared by the agents of the checks and so forth and absence of the originals, could be used in evidence. But here we have a particular question which the Government has laid its cards on the table and showed the court and counsel that we believe that there are what amounts to forged endorsements on these checks. And that requires the use of a document examiner to determine exactly who endorsed the checks and who received the income. And for this particular purpose we think it is within the general power of the court under these sections that have been cited to the court to compel the checks to be produced and photostated.

Mr. Brant: Just a very few brief remarks, your Honor.

With reference to this question of photostating or photographing these checks, there is something I feel compelled to call to the court's attention, and that is that this is relief which was never requested in the petition. There is no mention of it in the petition whatsoever. They merely seek, one, to hold us

in contempt; or, two, to require us to appear and permit them to examine them. This is relief [91] which apparently comes only out of the affidavit filed by Mr. Tucker and is not part of the petition.

Secondly, I should like to mention briefly this continuing examination or continuing investigation concept which apparently is here involved. I gather from the statement that where you have a continuing examination that you may repeatedly, without any limitation whatsoever and for as many times and on as many occasions as the particular agent might desire, may examine and re-examine and re-re-examine the books and records of a party. I don't think that is authorized by the statute.

There is also this question of whether or not the tax liability has been determined. There the Commissioner has determined in connection with all three respondents, one, their civil tax liability; and, two, he has asserted civil fraud penalties against each one of them. The only thing that he——

The Court: Have they been determined, the civil——

Mr. Brant: That is the determination. Now, he bears the burden of proving that. The Commissioner bears the burden of proving the fraud assertion, that penalty, when he gets into the tax court. But that is a determination.

The Court: Well, isn't he entitled to make some discoveries for the purpose of being able to prove it?

Mr. Brant: Absolutely, your Honor, and through the tax court. But you will recall that Mr. McHale just now mentioned, [92] and I wrote it down quick-

ly as he stated it, that the petitioner here is not using this process in this court in furtherance of any of the tax court proceedings. And I submit what else could he be seeking these records for. And the only conclusion that I can come to is that he is not using it in connection with the tax court proceedings and the only thing he could be using it for is criminal liability. And I submit that that is unauthorized.

The Court: Why wouldn't that be a permissible use?

Mr. Brant: The statute authorizes an examination to determine the correctness, to ascertain the correctness of any return. That is not a part of a criminal case at all. It may well be a part of the civil tax fraud penalties which the Commissioner in this case has asserted against all three of the taxpayers. It might well be a part of it. And he might well examine for this. But counsel has admitted just a few minutes ago that he wasn't using it in furtherance of the tax court proceeding. The only thing that I can see he is using it for now is for the criminal proceeding. And the administrative summons, as pointed out in *U. S. v. O'Connor*, notwithstanding the fact that that was after indictment, they were seeking information to help improve their case, the court points out that you can't use an administrative summons for this purpose. They want information. There are rules of criminal procedure which authorize them to get information [93] by doing certain things, and we submit they should use those procedures and not use an administrative summons for that purpose.

The Court: Anything further?

Mr. McHale: All I meant to say, your Honor, with respect to this one statement I made with respect to furthering a tax court proceeding is that I understand that if an additional fraud assessment were made, which could be made at any time as a result of this later thing, it wouldn't refer to the particular action now pending in the tax court but would be an additional assessment. And I meant that we weren't using this with respect to discovery in the particular proceeding now going forward. I think the Borens have petitioned for one year. [94]

* * * * *

December 6, 1955; 5:40 o'clock p.m.

* * * * *

The Court: The motion of the petitioner to strike the Second and Ninth separate defenses in the respondents' answer to the petition is granted. And, otherwise, the motion to strike is denied.

The separate defenses which stand are not sustained. The petition is sustained.

The prayer of paragraph IV, the prayer of the petition, in my opinion is sufficient in asking for other and further relief as to warrant the order with respect to copying or photographing.

The petition is granted to the extent that the respondents are ordered to appear and give testimony in response thereto and to produce the documents therein set forth in the summons, Exhibits A, B and C to the petition.

Now, you have a problem of mechanics with respect to this photostating; and also a problem of

the time. When does the petitioner wish this proceeding to continue?

Mr. Tucker: At the earliest possible date, your Honor.

The Court: Tomorrow?

Mr. Tucker: That would be agreeable.

The Court: Is there any reason why it shouldn't go ahead tomorrow?

Mr. Brant: Only the mechanical problem of assembling the records and delivering them, your Honor. Tomorrow is— I believe we could comply tomorrow, yes, your Honor.

The Court: Wednesday?

Mr. Brant: Wednesday would be preferable, yes.

The Court: Very well. At this 6th Avenue address?

Mr. Brant: Yes, your Honor.

The Court: 3755 6th Avenue. Is that practicable?

Mr. Brant: For me?

The Court: Is it practicable to transport these records——

Mr. Brant: Yes, your Honor.

The Court: Very well. Then the respondents are ordered to appear at 3755 6th Avenue, San Diego at 10:00 o'clock on the morning of December 7, 1955, and produce the records called for in the summons and then and there give testimony with respect thereto as required by the summons. And in the event they fail so to appear or produce the records or to give the testimony required of them at that time, they are to appear before this court on December 13th next at 10:00 o'clock and then and there show cause, if any

they have, why they and each of them shall not be held in civil contempt of this court and penalties assessed accordingly.

The Government will prepare and settle under Local Rule 7 within three days findings of fact, conclusions of law and order accordingly.

Mr. Brant: Your Honor, would it be possible for the examination date to be contemporaneous with or immediately follow the date on which they file the findings of fact and conclusions of law? That would permit me to have a little better opportunity to make an examination of what the next course of action would be.

The Court: You mean Thursday?

Mr. Brant: If they have three days; the day following that.

The Court: Well, let's not give them three days; because the more time you take for these things, sometimes, the more time that is taken, or found necessary to be taken.

How much time do you need, Mr. McHale? This is a summary proceedings and has been too long delayed now.

Mr. McHale: If I prepared them tomorrow—Will your Honor be in San Diego or in Los Angeles?

The Court: I'll be in Los Angeles tomorrow afternoon.

Mr. McHale: I can submit them to your Honor by Wednesday morning, I presume; but then—

The Court: Submit them to Mr. Brant for his approval as to form. If you gentlemen can collaborate on them, why,—

Mr. McHale: I was thinking of going back to

Los Angeles, and it's a question of communicating, but——

The Court: Can you prepare them here?

Mr. McHale: Not until tomorrow, in any event.

The Court: Perhaps you can collaborate with Mr. Brant and prepare them here tomorrow and get his approval as to form, and then you would have them.

Do you wish until Thursday on the order to appear?

Mr. Brant: I would like to see what kind of findings of fact and conclusions of law we have before I—It will better permit me to evaluate the position of the respondents from here on out, your Honor, if we have the findings of fact and conclusions of law settled before the examination.

I think counsel will agree that there is no danger in connection with the destruction of these records, or any great urgency. So if we could have just one day after the date on which findings should be filed that would be adequate, your Honor.

The Court: Prepare them tomorrow, and we will have the examination Thursday.

Mr. Brant: That would be satisfactory, your Honor.

Mr. McHale: I will try to prepare them tomorrow, your Honor.

The Court: Just lay everything else aside and do it, now.

Mr. McHale: Yes, sir, I will do that.

There is one further thing your Honor, in your Honor's order that the respondents are to appear

at—I think it's 3755 6th Avenue to testify and produce records. There are no photostating or photographing facilities at that address.

The Court: Well, that's what I was coming to now, the question of mechanics. How are you going to work that out?

I can have them placed in the custody of the clerk and the clerk make photostatic copies.

Mr. Brant: Your Honor, I think it could be worked out in this manner: If your Honor is going to order the taxpayers to submit to the photostating of these records, Mr. McHale and I can work out an acceptable arrangement for handling the mechanics of the photostating, to have that done. I am certain of that. The only question that I ever had in mind was his entitlement to the copies. Once your Honor has established that, why, the manner of doing it is one that we can easily work out, I am certain.

The Court: Very well. Then the respondents will understand that they are to appear and produce the records called for by these three summons at 10:00 a.m. on Thursday instead of Wednesday. That will be Thursday, the 8th of December.

Otherwise, the order heretofore made will stand. In the event they fail, or any of them fail, or refuse to appear at 10:00 a.m. on December 8th and give testimony, or to produce and permit the copying or photographing of any of the records called for by the summons, they should appear on the 13th of December next at 10:00 o'clock in the morning and show cause, if any they have, why they should

not be held in contempt, and further proceedings had accordingly.

Mr. Brant: Yes, sir.

Mr. McHale: Could your Honor make an order that if the records be produced that they could be turned over to the clerk of the court for photostating? I spoke to Mr. Childress about this, and he said if the court will make an order he will do the photostating.

The Court: Oh, I assume you gentlemen can arrange to take them to some company down here, can't you?

Mr. Brant: I am certain we can, your Honor. I don't think we will have any difficulty to that extent at all.

The Court: If it must be done through the clerk's office it will take several days, very likely; whereas you gentlemen can probably have it done in a matter of hours.

Mr. McHale: I understand there is a Navy Lab, also, down here that will do it for the Internal Revenue Service.

The Court: I would assume from what Mr. Brant says that there will not be any problem in that respect.

Mr. Brant: No, your Honor.

The Court: The problem will be with respect to his position on the point of the production rather than the photographing, I take it.

Mr. Brant: That is correct, your Honor.

The Court: Very well. Is there anything further?

Mr. Brant: Nothing further, your Honor.

Mr. McHale: Nothing further, your Honor.

The Court: As far as the findings are concerned, gentlemen, in view of the lateness of the hour I didn't undertake to make detailed oral findings. There are very few matters in dispute.

Of course, I find that it is a continuing examination and further examination of the records as necessary to the examination being undertaken to determine whether or not there has been fraud in connection with the returns, as well as possible criminal prosecution. But the statutory basis for the examination is the open issue as to fraud liability. The fact that the information may be used in a criminal prosecution I deem immaterial.

If there are any further specific findings you wish me to indicate, I will be glad to do so now.

Mr. Brant: None at the moment, your Honor.

The Court: Very well. Is there anything further, Mr. Clerk.

The Clerk: That is all today, your Honor.

The Court: Court will adjourn.

* * * * *

December 7, 1955: 2:00 o'clock p.m.

The Clerk: Case No. 1780-SD Civil, Lloyd M. Tucker vs. Clifford O. Boren Contracting Co., et al.

Mr. McHale: Ready for the plaintiffs.

Mr. Brant: Ready for the respondents.

This is a motion to stay the enforcement of judgment, and a motion for this court to now fix the amount of supersedeas bond pending appeal of the case.

Your Honor will recall that today a judgment, signed and I understand filed in this action, requires the respondents to appear before the petitioner Lloyd M. Tucker tomorrow morning at 10:00 o'clock a.m. and to produce for examination certain records and to permit the photographing of those records.

The respondents have prepared and intend to file a notice of appeal to the United States Circuit Court for the Ninth Circuit. And that notice of appeal has not been filed as yet, the only reason being that the judgment has not been entered.

The respondents ask for a stay pending appeal on the condition that the appeal be perfected within 30 days; and on the further condition that they deposit in court the amount of the supersedeas bond that may be determined.

The grounds for the motion are that unless the judgment is stayed pending the appeal, the respondents' appeal therefrom would be ineffective and they would be required to deliver up the records tomorrow morning or be in contempt of this court. The latter, of course, the respondents do not wish to do, and we do respectfully submit, your Honor, that a stay of execution should be granted to the respondents under Rule 62 of the Rules, Federal Rules of Civil Procedure.

The Court: What bond do you offer?

Mr. Brant: I would suggest, your Honor, that the respondents are able to furnish any type of bond that your Honor would specify. I would suggest, as a figure—I do not have an expression from

Mr. McHale as to what the petitioner would wish, but I would suggest a thousand dollar cash bond or such other type of bond as your Honor may feel is necessary under the circumstances.

Mr. McHale: Your Honor, the petitioner Tucker opposes this motion, the grounds principally being this is not a final and appealable order; and that the only appeal which can be taken would be from a final commitment of contempt in the event that the respondents failed to comply with the court's order. This is not appealable, and no appeal should be taken from this, and, of course, no stay should be given.

The Court of Appeals in the Ninth Circuit, Chapman vs. Goodman, 219 Fed. 2d 802, had before it an appeal by a witness who took an appeal from an order directing him to appear before an Internal Revenue agent and testify and produce books and records. And in that appeal the Court of Appeals held that the order was one that was not appealable; that an appeal would not lie from such an order. And Judge Hall in the recent case of Huebner vs. Tucker, which is on appeal to the Ninth Circuit, which has been referred to in the briefs of this action, the appeal that was taken in that case was taken from the final order of commitment for contempt.

That, we feel, where the witness finally refused and the court ordered her committed, that is such an order which would be final and appealable; and these other things which took place during the course of the proceedings would become grounds

for an appeal, perhaps, after the final judgment of commitment, or whatever it would be, would be entered.

There is a case in the Seventh Circuit referred to in the case of *Chapman vs. Goodman, Jareki, Collector vs. Whetstone*, 192 Fed. 2d 121, and *Jareki vs. Whetstone*, as I recall it, arose as an enforcement of a Collector's summons. That is, the procedure which has been carried over into the 1954 Revenue Code. And the Seventh Circuit there held that the appeal would lie from the final commitment for contempt, but not from an order directing a witness to appear. For that reason we urge that the motion be denied.

Mr. Brant: I understand that your Honor has before him the case of *Chapman vs. Goodman*, and my remarks in opposition to Mr. McHale's are going to be directed specifically at that case.

In *Chapman vs. Goodman* I think the dictum of the Circuit Court of Appeals for the Ninth Circuit clearly supports our position that the order is now appealable. In that case the court stated,

"This court thinks if the order is one of such finality that it essentially terminates the summary proceedings the order should be and is appealable." And then paragraph (4) states, "In the instant case, while Attorney Chapman has been ordered to appear before Goodman (and if that were all, the order might be considered final) it does not look as though the court below by its order has come to final grips with the ultimate issue, and that time will arrive when it defines by appropriate order what

questions Chapman must answer and what if any documents must be produced.

“In this court’s consideration of this case, it has found *In re Albert Lindley Lee Memorial Hospital*, *supra*, most helpful. It is to be observed parenthetically that there the doctor who was under investigation by the Internal Revenue agent promptly asked to intervene and was granted intervention in the agent’s proceedings against the hospital, custodian of the records, in which the hospital had been ordered to disclose names of patients under care of the doctor who had been received at the hospital within a certain period.

“The proceedings *In re Albert Lindley Lee Memorial Hospital*, *supra*, after the issuance of the original *ex parte* order, appear to have followed the Federal Rules of Civil Procedure, which was within the court’s option under Rule 81(a)(3). They eventuated in a definitive order that clearly outlined the limits of the agent’s possible interrogation. The retained jurisdiction therein was merely ancillary. If the last order of the District Court here had reached an ultimate definition of the scope of permissible examination of the witness as was attained in the order in *Albert Lindley*, this court should hold the order here appealed was appealable.

“Here in Chapman’s case it may eventuate that preliminary examination will develop whether all or part of the mass of papers held by Chapman are entitled to privilege; * * * * *”

Your Honor will recall that this was the attorney-

client privilege. “* * * * or, it may develop that the only way the issue can be finally resolved is by Chapman handing the papers up to the judge of the District Court for his private examination.”

And then there are some citations.

“Certain disclosure is not required until Chapman has exhausted his rights in the courts. Inasmuch as we hold that when a definitive order as to what must be revealed has been made in this case, such an order surely will be sufficiently comprehensive to permit an appeal herein and probably will eliminate the necessity of Chapman falling back on refusing to obey the order, ‘standing upon his rights,’ and then seeking habeas corpus. In jurisdictions where presently the latter procedure is the only remedy for the witness, the contempt is not criminal. It is difficult to imagine the occurrence of anything beyond pro forma detention while the necessary steps are taken to get an appellate review.”

We submit, your Honor, that the order which was entered here today is a final, definitive order, specifying precisely the books and records and documents which must be delivered to petitioner Lloyd M. Tucker, and nothing further is to be done in the proceeding, and the court still retain jurisdiction, of course, for if the respondents fail to deliver up these books and records the court will find them in contempt of court.

The Court: The order is definitive as to the production of the books and records in that it specifies a time and place and specifies what is to be produced.

But is the order definitive as to the questions to be answered? We don't know.

Mr. Brant: I would say it is not, your Honor.

The Court: Then isn't that what would give it the non-final character?

Mr. Brant: That may well have that effect, your Honor. We have not been concerned about the testimony, and as a result I haven't given the matter any consideration. We have been concerned only with the deliverance of the books and records.

The Court: It seems to me that if the order for production stood alone the motion would be well taken, since that order would be final and appealable. Anything further to be done in the proceeding would be in the enforcement of the order. But since the court can't know what the testimony is that may be called for or what questions may be asked, it seems impossible for it to be final as to that because there would have to be a hearing upon the order to show cause, a hearing as to whether or not these respondents can properly be ordered to answer the questions, if any, which they refuse to answer; and then a further order made directing them to answer, or holding them in contempt if they fail to do so.

Mr. Brant: My only concern, of course, is not to have my clients be advised into contempt or to be committed for contempt, and I had hoped to in some manner, through this procedure, prevent that from coming about, your Honor. I find it very difficult myself to advise my clients to be contemptuous of the order of the court, and yet they do have

the right of appeal and they want to exercise that right.

I might also comment, your Honor, if I may, that the record will show that the respondents did appear originally before the petitioner and did give testimony but did not deliver up to him the books and records. In the record I don't believe there is any objection as to any question which was asked by the petitioner.

The Court: It seems to me, Mr. Brant, that this case of Chapman against Goodman, 219 Fed. 2d, 802, doesn't give us any room to debate whether part of this order might be final or not. But probably it is all interlocutory in character for the reasons expressed by Judge Chambers in the Chapman case. As to the testimony to be given, it is clearly not final because we don't even know what questions may be asked and what objections, if any, may be interposed.

And as to production of documents, while the order specifies what is to be produced, you don't know what evidentiary objections may be made, if any, at the time, or whether there might be some claim of privilege made, as was involved in the Chapman case. So the order as Judge Chambers interprets it is this, your client is directed to produce these records at the time and place of hearing. That means to bring them there and appear there and be there. If they wish to assert claims of privilege, if there are any, or any other evidentiary objections, of course they may be asserted at that time. And then pursuant to further order

to show cause they would be required to appear on the 13th of December and show cause why they shouldn't be compelled to answer, or be held in civil contempt for failure to do so.

As to the failure to submit for inspection or offer for examination or photostating any of the documents, if there is a claim of privilege, if there is some new claim asserted, that objection would have to be heard and there might be necessary a further order before your client would be brought into contempt. So, as I interpret the order, the only way they could be brought into contempt under the order issued would be by failing to appear or by failing to bring with them the records and produce them then and there in the presence of the petitioner or the revenue agent, produce the documents specified.

Is that in accord with your interpretation of the order, Mr. McHale?

Mr. McHale: Yes, your Honor.

The Court: So as I view it you are not yet confronted with any final order overruling possible objections to, or possible claims of privilege to, the evidentiary use of the documents.

So the motion for a stay as to the existing order will be denied. And you prepare and settle under Local Rule No. 7 within three days a formal order embodying the rulings made here today.

Mr. McHale: Yes, your Honor.

Mr. Brant: Thank you, your Honor.

The Court: Anything further, Mr. Clerk?

The Clerk: That is all this afternoon, your Honor.

Tuesday, December 13, 1955; 11:45 a.m.

The Clerk: Case No. 1780, Clifford O. Boren Contracting Co., Inc., et al.

Mr. McHale: Ready, your Honor, for the petitioner.

Mr. Brant: Ready for the respondents.

The Court: Are the respondents present?

Mr. Brant: Yes, your Honor, they are.

The Court: Let me see the file, Mr. Clerk.

Mr. McHale: Your Honor, pursuant to the order of the court the respondents appeared before the petitioner on December 8, 1955 but did not comply with the order of the court and, therefore, have returned today.

The Court: In what particular did they fail to comply; one to appear; two to testify and three—

Mr. McHale: They appeared, your Honor. They testified. But they did not produce the books, records, papers and pay roll checks that they were required to produce, and refused to do so.

I have here a transcript of the proceedings, which Mr. Brant has been furnished with. May it be stipulated it is a true copy?

Mr. Brant: It certainly may. But I think we can shorten it even a little more than that, your Honor.

I think it can be stipulated that the respondents, all three of them, did appear; they did testify; they did produce the specified books and records—that is, by bringing them with them. They respectfully

declined to permit the copying, examination or photostating of the records.

The Court: Very well. Do you wish to file a transcript?

Mr. McHale: Yes, I do.

The Court: Is it stipulated to be a true transcript of the proceedings before the agent?

Mr. Brant: Yes, your Honor, so stipulated.

Mr. McHale: I have an additional copy for the court's convenience.

The Court: Very well. The transcript will be received as Petitioner's Exhibit next in order upon this hearing.

Mr. McHale: I don't wish to stipulate that they produced the books, records and papers.

The Clerk: I don't know what the next number is, your Honor.

The Court: This would be a new hearing. It will be Government's Exhibit No. 1 on this hearing.

(The exhibit referred to was marked Petitioner's Exhibit 1 and received in evidence.)

[See pages 207-214.]

The Court: I didn't understand your last remark.

Mr. McHale: Mr. Brant offered a stipulation, but I didn't want to be in the position of stipulating that they produced the books and records.

The Court: Is it agreed they had them with them?

Mr. McHale: Yes.

The Court: Well, that's production as I understand it. "Production" is a very indefinite term.

I think it is unfortunate; and after our hearing the other day in Los Angeles I regretted that I didn't change that. The old form of "bring with them" is the better form, I think, because it has meaning.

Mr. McHale: I agree with your Honor.

The Court: "Bring with you and there produce for examining, copying and photostating."

So it is stipulated, I take it, that these respondents brought with them at the time and place ordered these specific records?

Mr. Brant: It is so stipulated, your Honor.

The Court: Is it so stipulated by the Government?

Mr. McHale: Yes, your Honor.

The Court: So the only failure of compliance, as I understand it, is agreed to be that they refused then and there to permit examination or copying or photostating or photographing of any of the records then and there brought with them.

Mr. McHale: That's right, your Honor.

Mr. Brant. That's correct, your Honor.

The Court: And what are the grounds upon which that refusal was based?

Mr. Brant: Your Honor, the grounds are set forth in the affidavit of the respondents on file in this case; and at the time of the hearing the respondents made this statement to petitioner:

"In response to the order of the United States District Court, Clifford O. Boren, president of the Clifford O. Boren Contracting Company; Delta M. Boren, vice president of the Clifford O. Boren Contracting Company; and the Clifford O. Boren Con-

tracting Co., Inc., appeared before Special Agent Lloyd M. Tucker at the time and place specified in the order and there produced the records called for by the summonses. They and each of them respectfully declined to permit the examination, copying or photostating of the records for the reasons set forth in their answer to the petition filed by Petitioner Lloyd M. Tucker in this action and to enable them to appeal the judgment of this court to the United States Court of Appeals for the Ninth Circuit."

And that is, essentially, your Honor, the reason why the respondents have at this time, or did at the time of the appearance before Mr. Tucker, decline to permit the copying, examination and photostating of the records. They felt it necessary, on the advice of counsel, to do so in order to enable them to appeal the decision of this court.

The Court: That's the only ground?

Mr. Brant: That is the only ground, yes, your Honor.

The Court: I take it you are relying upon the authority we discussed the other day.

Mr. Brant: Yes, your Honor.

The Court: Will you give the citation for the record?

Mr. Brant: I can if the court will be indulgent just one moment.

The Court: Yes.

Mr. Brant: The name of the decision, as I recall it, is Chapman vs. Goodman, a decision of the

Circuit Court of Appeals for the Ninth Circuit, and the citation is 219 Fed. 2d, 802.

The Court: Mr. Bailiff, will you get that, please?

Do the respondents have with them today the records?

Mr. Brant: They don't have them in their physical possession. They are in my office and immediately available.

The Court: Is the petitioner Tucker present?

Mr. McHale: Yes, your Honor.

The Court: How voluminous are the records? Can they be brought here without any inconvenience?

Mr. Brant: It would be a load to bring them down, but not too inconvenient to bring them down.

The Court: One of the difficulties of this order made, as we discussed the other day, as far as the testimony is concerned it couldn't be final as far as the testimony is concerned—that is, as far as the order to give testimony is concerned—because of the impossibility of knowing what questions would be asked and what questions the witness would be called upon to answer.

As to the production of the records for examination, copying and photostating, standing alone the order is such as could bring the respondents into contempt by their failure. But to obviate any possibility of any contention that the order of December 7th is not sufficient, I will order that the respondents appear here at 2:00 o'clock this afternoon—the petitioner will appear, also—and bring

with them the records called for in the summonses, and then deliver to petitioner for examination, copying and photographing or photostating, the records in question.

In other words, I will treat it like a grand jury proceeding, and when they appear this afternoon I will make the order again that they then and there deliver over to the petitioner for examination and for copying and for photographing or photostating, in the custody of the clerk. Or, to state it more accurately, to deliver over to the clerk into his custody for examination and copying or photographing or photostating by the petitioner Tucker, the records in question.

Mr. Brant: Yes, sir.

The Court: And if the respondents refuse so to do they will bring themselves into civil contempt of the court.

Mr. Brant: Yes, your Honor. May I make one inquiry, your Honor? The only reasons why the respondents would refuse so to do are the reasons set forth in our answer. If we so decide, may that this afternoon be stated by reference, or would you prefer to have me make a digest of these various reasons set forth in our answer?

The Court: Well, if you have already stated all the reasons——

Mr. Brant: I have stated all the reasons, yes, sir.

The Court: Then you may merely say, “for the reasons heretofore stated * * *”

Mr. Brant: Yes, sir. It is possible that this

might be—unless your Honor so desires—your suggestion might be taken care of by stipulation between counsel. They have so produced the records and——

The Court: Of course, if they refuse in the presence of the court, why, that could be a criminal contempt, also. But there is no disposition on the part of the Government, I take it, to——

Mr. McHale: We are treating this as a civil matter, your Honor.

The Court: ——proceed otherwise than by civil contempt.

So the record will be clear I suggest that it be done; and that will be the order.

Mr. Brant: Thank you, your Honor.

The Court: We will take this up then right at 2:00 o'clock, gentlemen.

Mr. Brant: Thank you very much.

The Court: We will recess until 2:00.

(Whereupon a recess was taken until 2:00 o'clock p.m. of the same day.)

December 13, 1955; 2:00 o'clock p.m.

The Clerk: Case No. 1780, Lloyd M. Tucker, etc., vs. Clifford O. Boren Contracting Co., Inc., et al.

Mr. McHale: Ready for the petitioner.

Mr. Brant: Ready for respondents, your Honor.

The Court: Are the respondents ready?

Mr. Brant: Yes, your Honor, they are.

The Court: Clifford O. Boren. Let him come to the bar.

Delta M. Boren. If you will just stand with your counsel.

Do you have with you the general journal, the cash journal, the general ledger, the pay roll records and the payrolls checks described in the summons issued by the petitioner Lloyd M. Tucker and heretofore served on you?

Mrs. Delta M. Boren: Yes, your Honor.

The Court: You have them with you?

Mr. Clifford O. Boren: Yes, we do.

The Court: They are 1951 records I observe. Have they been separated from the later records of the corporation?

Mr. Clifford O. Boren: Yes, sir.

Mrs. Delta M. Boren: Yes, sir.

The Court: So they are here as a separate group of papers, are they?

Mr. Clifford O. Boren: Yes, sir.

The Court: Very well. It is the order of the court to each of you that you now deliver those records into the custody of the clerk for examination, copying and photographing or photostating by the petitioner, Lloyd M. Tucker, special agent of the Internal Revenue Service.

Mr. Clifford O. Boren: On advice of counsel I must respectfully decline to obey the court's order.

Mrs. Delta M. Boren: I, too, on advice of counsel must respectfully decline to obey the court's order.

The Court: Do you wish to state any other reasons for your refusal?

Mr. Clifford O. Boren: My reasons are those set forth in the answer to the petition filed in this court.

Mrs. Delta M. Boren: My reasons are those set forth in the answer to the petition filed in this case.

The Court: Very well. It is now the judgment of the court, Clifford O. Boren and Delta M. Boren, that each of you be committed to the custody of the Marshal of this court, to be by him imprisoned in a jail-type institution until the affirmative order of this court is obeyed. I don't think there is any question in your mind as to what the order is, is there? You both feel you understand the order?

Mr. Clifford O. Boren: Yes.

Mrs. Delta M. Boren: Yes.

Mr. Brant: If the court please, would that also include the Clifford O. Boren Contracting Co., Inc.? All three, the two individuals and the corporation itself, are parties to this action.

The Court: As to the corporation the most I could do is fine it to cover the expenses of the Government in the civil contempt action. There is nothing penal with respect to it, or punitive.

What expense has the Government been put to in connection with this proceeding?

Mr. McHale: The expenses, your Honor, have been primarily those of travel; that is, of counsel from Los Angeles——

The Court: Just give me the estimate of what——

attorneys for the Government don't cost anything?

Mr McHale: Well, yes, salaries, of course.

The Court: I asked you for an estimate of the expense that you have been put to in this proceeding.

Mr. McHale: I would estimate, your Honor, that to date the expenses would be approximately——

The Court: This is the expense you have been put to by reason of the failure or refusal of the respondents to obey the summonses and the order of the court.

Mr. McHale: Yes. I would estimate, your Honor, that the expenses of travel of counsel and the agent who had—if that could be included. I don't——

The Court: I should think that you might only recover for the expenses occasioned by the contempt, the refusal to obey the order of the court.

Mr. McHale: For this proceeding I would estimate \$25 for this proceeding today; that is, the expense of travel down here today. I would say with respect—you Honor is limiting it only to today's proceedings, is that not correct?

The Court: The expenses occasioned by the contemptuous conduct of the corporate defendant here.

Mr. McHale: Well, since your Honor presumably limits it to these proceedings today I would say the cost of travel would be \$25, and the cost of counsel would be \$50.

The Court: The cost of the agent and all other expenses?

Mr. McHale: The cost of the agent we would

estimate to be \$35, your Honor. That doesn't take into account the other appearances that have been made heretofore.

The Court: I take it there has been no damage caused by the refusal to obey except those that have been occasioned subsequent to the order.

How much does all that total?

Mr. McHale: I have a figure of \$110 as to the proceedings with respect to this particular matter today.

The Court: The damages proximately caused to the United States by the refusal of the corporate defendant to obey this order. You say \$110?

Mr. McHale: Yes, your Honor.

I think there are other proximate costs that would enter into this; that is, other appearances before this court which would be occasioned. But if your Honor is limiting it to just today's proceedings, I would say that is the cost.

The Court: As I view it, the only fine that could be assessed would be a compensatory fine to compensate the petitioner, who is an officer of the United States, hence the Government, for the contumacious failure to produce the records for copying, photographing, photostating and making an examination as required by the order of December 7, 1955.

Mr. McHale: Yes, your Honor. That would be my approximation, your Honor.

The Court: Then do the respondents Clifford O. Boren, as president, and Delta M. Boren, as vice president, representing the Clifford O. Boren Con-

tracting Co., Inc., the corporate respondent, now refuse on behalf of the corporation to obey the order of the court to permit the inspection, copying, photostating, photographing of the records in question?

Mr. Clifford O. Boren: Yes, sir.

The Court: Very well. The court also finds the corporation guilty of civil contempt of the court and assesses a compensatory fine against the corporation in the sum of \$110; that fine to be paid the clerk and to be by the clerk in turn, paid over to the United States of America.

The individual defendants may purge themselves of contempt, of course, at any time by complying with the order to permit the examination, copying, photographing or photostating of the records. In the language of the cases they carry the keys to the jail themselves.

Mr. Brant: May I now address the court, your Honor, with reference to a motion?

The Court: You may. Before you do that, the Government will prepare a formal order embodying these rulings and submit it for approval today.

Mr. McHale: Very well, your Honor.

The Court: Will you submit it to Mr. Brant as attorney for the respondents, under the rule, for approval? And I trust you gentlemen can collaborate on it and get it entered today.

Mr. McHale: I am sure we can, your Honor. We have had no trouble in the past.

The Court: Very well.

Mr. Brant: Your Honor, at this time the re-

spondents move the court for a stay of execution of the judgment in this action, the judgment which has just been rendered; and for that purpose to fix the amount of a cash deposit in lieu of the supersedeas bond to be filed by the respondents.

I am informed by Mr. McHale that he will not oppose the motion. And I am also informed that a total bond in the amount of—a total cash deposit in lieu of the supersedeas bond in the amount of \$1,000 would be adequate from his standpoint for the protection of the Government.

Mr. McHale: I think that lies within the court's discretion here.

The Court: Is there any objection, first, to the motion to stay, the writ of supersedeas here, to stay the execution?

Mr. McHale: No objection, your Honor.

The Court: Is there any statute of limitations about to run?

Mr. McHale: No, your Honor. I understand that the first statute would be 1957, I believe. In view of your Honor's comments the other day, we voice no active opposition.

The Court: If there is any occasion that the Government would be prejudiced by a stay, I will hear from you.

Mr. McHale: Well, the only thing is that this sort of proceeding is summary in nature and there are statutes running. But I must advise the court that the statute will not run until, I believe, March 1957, the earliest statute.

The Court: The court in Chapman against Goodman, 219 F. 2d 802, at page 806 states,

“This court thinks if the order is one of such finality that it essentially terminates the summary proceedings the order should be and is appealable.”

And then it goes ahead to discuss later the retained jurisdiction. It intimates that if the retained jurisdiction is merely ancillary the order may be of that finality which renders it appealable.

I take it the order here made is now certainly—the order made today, which, Mr. McHale, you should prepare also a formal order covering the rulings made this morning, affirmative order directed to these respondents this morning——

Mr. McHale: Yes, your Honor, I will prepare that.

The Court: ——and this afternoon. And then a subsequent order adjudging them guilty of civil contempt, and the orders made on the contempt. So there will be two orders to be prepared.

Mr. McHale: Yes, I will do that.

I want to point out to the court that I feel that this order now is an appealable order. My objection the other day was, of course, that it was not a final order.

The Court: Yes. You prepare the appealable order; the order made this afternoon; and then, subsequently, the refusal and the finding of contempt.

Is there any reason why these records shouldn't be impounded with the clerk?

Mr. Brant: No, there is not, your Honor.

The Court: Very well. The court will grant the motion for a stay of execution pending appeal and fix the bond—is the suggested amount a thousand dollars?

Mr. Brant: Yes, your Honor; the total of three of \$1,000.

The Court: Is that amount agreeable to the petitioner?

Mr. McHale: Yes, your Honor.

The Court: Fix the amount of the supersedeas bond in the sum of \$1,000 upon the condition that the records here in court be delivered to the clerk, delivered into the custody of the clerk. You may seal them before you deliver them into the custody of the clerk if you like. Deliver them in the custody of the clerk under seal and he will keep them under seal pending further order of the court, either of this court or the Court of Appeals.

Mr. Brant: Your Honor, I have already prepared a form of cash deposit in lieu of supersedeas bond subject to the same conditions as are required by Rule 26 and Rule 73, and I am now prepared to submit that form to the court and also to submit the cash deposit to the court. Mr. McHale has had copies of these forms and I understand that from the standpoint of the form they do meet with his approval.

The Court: Well, you gentlemen have quite a bit of work to do this afternoon, three orders to be prepared, and I suggest that you prepare those and return later and we will sign them all later this afternoon.

Mr. McHale: Very well, your Honor.

The Court: Do you wish to seal them first?

Mr. Brant: I would prefer to seal them.

The Court: Well, either you can seal them or the clerk can seal them.

Mr. Brant: I prefer that the clerk do that, your Honor.

The Court: Very well. The clerk will seal them and keep them under seal.

Now, is it stipulated that what is delivered to the clerk comprises—I think you had better describe them and get a stipulation in the record as to what is now being delivered to the clerk and then deliver them to the clerk item by item so that he can keep them separate.

Mr. McHale: Of course, your Honor, on these records you understand the petitioner has never seen them. I mean, they have been produced, and this is what the parties said are the records. Of course, we can't stipulate as to——

The Court: At least we will have the statements of the respondents on the record as to what is delivered to the clerk.

Deliver it item by item, if you will. Let's keep them in the same order as they are in the summonses for the purpose of regularity. First is a general journal for a certain period, and you are handing the clerk certain sheets from the general journal of the corporate respondent Clifford O. Boren Contracting Co., Inc.?

Mr. Brant: That is correct. I am handing to the clerk of the court a document which is the general

journal entries for the period July 1, 1951 to December 31, 1951. This document consists of 18 pages. The numbering is——

The Court: Nine sheets?

Mr. Brant: Nine sheets, yes, your Honor. In addition, contained within here are numerous type-written sheets that are attached to the individual sheets.

The Court: Very well. You may hand it to the clerk, if you will, now.

There have been exhibits marked, have there not, in the other proceedings?

The Clerk: In the other proceedings A, B and C, I think, have been marked. I think, however, this morning you started a new hearing and we marked Government's Exhibit No. 1 in this proceeding.

The Court: Very well. Let this be then Respondents' Exhibit A.

(The exhibit referred to was marked Respondents' Exhibit A for identification.)

The Court: Next is a cash journal. I am taking these in the order in which they appear in Exhibit A attached to the petition in 1780.

Mr. Brant: I hand to the clerk a group of 30 sheets entitled on the first sheet "Clifford O. Boren Contracting Co., Inc., daily journal, fiscal year 1951-52."

This covers the period July 1st—the particular sheets that I hand him cover the period July 1, 1951 to December 31, 1951. And this document is

the so-called cash journal of the contracting company for the period.

The Court: That will be sealed and marked under seal as Respondents' Exhibit B for identification in this proceeding.

(The exhibit referred to was marked Respondents' Exhibit B for identification.)

The Court: Next is the general ledger, is it not?

Mr. Brant: I was starting to count the particular sheets.

The Court: Is it bound?

Mr. Brant: Yes, your Honor.

The Court: Would it be necessary, do you think?

Mr. Brant: As far as I am concerned it is not, your Honor.

The Court: Bound with a flexible cover? Bound general ledger for what period?

Mr. Brant: The period July 1, 1951 to December 31, 1951, your Honor. This is the general ledger for the specified period.

The Court: Very well. It will be placed under seal by the clerk and marked under seal as Respondents' Exhibit C for identification in this proceeding.

(The exhibit referred to was marked Respondents' Exhibit C for identification.)

Mr. Brant: The next item, your Honor, is the pay roll records. The pay roll records for the period July 1, 1951 to December 31, 1951, consist of two sets of documents; the first being a bound

folder entitled "Clifford O. Boren, Contractor, San Diego, California; the corporation pay roll for July through December 1951." This is the first part of the pay roll records.

The second portion of the pay roll records are individual earnings records, the number of which I do not know, but they are enclosed within a file box. I submit both of these to the clerk at this time.

The Court: The pay rolls and the pay roll checks are designated separately. Suppose you separate the checks.

Mr. Brant: I have the checks already separated.

The Court: Very well. The pay roll records you last described will be kept by the clerk under seal as Respondents' Exhibit D for identification in this proceeding.

(The exhibit referred to was marked Respondents' Exhibit D for identification.)

Mr. Brant: The next item called for by the summons, "Pay roll checks bearing the endorsements of any of the following named persons:—" and naming them.

I submit to the clerk 120 pay roll checks bearing endorsements specified in the summons.

The Court: Those will be kept under seal as Respondents' Exhibit E in this proceeding.

(The exhibits referred to were marked Respondents' Exhibit E for identification.)

The Court: Now, you have an undertaking, have you, to stay the execution?

Mr. Brant: I have a cash deposit in lieu of an undertaking. I have with me a certified check in the amount of \$1,000 cash, together with a deposit statement conditioned as a supersedeas bond is to be conditioned, and also subjected to Rule 8(c) of the Local Rules as cash deposits are required to be. I have that here, and——

The Court: Is that in a form agreeable to the petitioner?

Mr. McHale: I believe so, your Honor.

The Court: Very well. You may submit that now. And that will obviate the further necessity of an appearance by Clifford O. Boren and Delta M. Boren later in the day.

Mr. Brant: I would like permission at this time, your Honor, since this document contains a recital of a notice of appeal to file with the clerk at this time the notice of appeal.

The Court: You may file the notice of appeal.

It is intended that this be security for bail pending appeal insofar as the individual respondents are concerned?

Mr. Brant: For the complete fulfillment, your Honor, of this judgment. I have tried to use almost the identical language of the rule of civil procedure which conditions bonds of this type. It is for the complete fulfillment of the judgment or any modified judgment.

The Court: Is it satisfactory as to form, Mr. McHale?

Mr. McHale: I believe so, your Honor.

The Court: It is my understanding that this

thousand dollars is deposited as supersedeas bond containing the usual conditions of a supersedeas bond in a civil judgment and in addition serves as a security for bail pending appeal of these individual respondents that they will submit themselves to the custody of the court again, and the custody of the Marshal,——

Mr. Brant: We submit it with that intention, your Honor.

The Court: ——in the event the judgment is affirmed.

Mr. Brant: Yes, sir.

The Court: Very well. Upon that understanding I will approve the cash deposit in lieu of supersedeas bond and accept the deposit upon the condition that it will serve not only as supersedeas bond but as bail pending appeal for the respondents Clifford O. Boren and Delta M. Boren.

Mr. Brant: Yes, your Honor.

Does your Honor desire a formal order granting our motion? It is my understanding that the supersedeas bond or cash deposit in lieu thereof, under the rules in and of itself is sufficient to operate as the stay. I have prepared and would be willing to submit later this afternoon, if your Honor desires, a formal order to that effect. It is my understanding that under the rules the approval of the bond is all that is necessary.

The Court: Yes, I prefer that you submit a formal order which would recite that the supersedeas bond is granted upon the condition that this deposit be made and that the deposit serve not

only as supersedeas for the judgment for the fine but also in the nature of security for bail pending appeal as to the respondents Clifford O. Boren and Delta M. Boren individually.

Mr. Brant: Yes, sir. Thank you, your Honor.

The Court: Very well. I will anticipate then that you gentlemen will have those orders back later today.

Mr. McHale: Yes, your Honor.

Mr. Brant: Yes, your Honor.

The Court: It will not be necessary for the respondents to return unless you gentlemen think of something. I don't perceive the necessity of the respondents returning.

Mr. Brant: I do not, your Honor.

Mr. McHale: I think not, your Honor. It is just a question of preparing the formal orders.

The Court: Very well. The respondents Clifford O. Boren and Delta M. Boren are now released on bail pending appeal from the custody of the Marshal and they may remain at liberty pending the appeal.

Mr. Brant: Thank you, your Honor.

[Endorsed]: Filed January 3, 1956.

GOVERNMENT'S EXHIBIT No. 1

Record of Proceedings of the Meeting with Clifford O. Boren, President, Clifford O. Boren Contracting Company, Inc., and Delta M. Boren, Vice President, Clifford O. Boren Contracting Company, Inc., at 3755 Sixth Avenue, San Diego, California, on December 8, 1955 at 10:10 a.m., in pursuance to Order of Honorable William C. Mathes, United States District Judge, December 7, 1955.

Present:

Clifford O. Boren, President, Clifford O. Boren Contracting Company, Inc.

Delta M. Boren, Vice President, Clifford O. Boren Contracting Company, Inc.

John A. Brant, Attorney, representing Clifford O. Boren, Delta M. Boren, and Clifford O. Boren Contracting Company, Inc.

Thomas J. Sullivan, Attorney, Internal Revenue Service.

Forrest P. Calkins, Internal Revenue Agent.

Lloyd M. Tucker, Special Agent.

Marie Travis, Stenographer.

Mr. Brant: I would like to add that the Clifford O. Boren Contracting Company, Incorporated, is also appearing.

Mr. Tucker: Mr. Boren, will you please stand and be sworn? Do you solemnly swear that the answers you will give to the questions asked of you will be the truth, the whole truth, and nothing but the truth, so help you God?

Mr. Boren: I do.

Mr. Brant: For the record, Mr. Tucker, I should like to object to the presence at this meeting of any persons other than yourself and your stenographer.

Mr. Tucker: Very well. Your objection is noted. Mrs. Boren, will you please stand and be sworn? Do you solemnly swear that the answers you will give to the questions asked of you will be the truth, the whole truth, and nothing but the truth, so help you God?

Mrs. Boren: I do.

Mr. Brant: May I interrupt, Mr. Tucker, and make a statement. In response to the Order of the United States District Court, Clifford O. Boren, President of the Clifford O. Boren Contracting Company, Inc., Delta M. Boren, Vice-President of the Clifford O. Boren Contracting Company, Inc., and the Clifford O. Boren Contracting Company, Inc. have appeared today before Special Agent Lloyd M. Tucker at the time and place specified in the Order of the United States District Court and have here produced the records called for in the summonses. They, and each of them, respectfully decline to permit the examination, copying or photostating of the records for the reasons set forth in their answer to the petition filed by Mr. Tucker in United States District Court, Civil Matter No. 1780-SD, and also to enable them to appeal the judgment of the United States District Court to the United States Court of Appeals for the Ninth Circuit, and I should like to ask individual responses

from Mr. and Mrs. Boren as to whether this is their statement that I have just given.

Mr. Boren: Yes, that is my statement.

Mrs. Boren: That is mine, too.

Mr. Brant: And the corporation, Mr. Boren?

Mr. Boren: Yes, it is.

Mr. Brant: Thank you.

Mr. Tucker: Mr. Boren, I understand you are here in your capacity as President of the Clifford O. Boren Contracting Company, Inc. Is that correct?

Mr. Boren: Yes.

Mr. Tucker: Mrs. Boren, I understand that you are here in your capacity as the Vice President of the Clifford O. Boren Contracting Company, Inc. Is that correct?

Mrs. Boren: Yes.

Mr. Tucker: Now, I am going to read to you Paragraph 7, appearing on Page 10 of Findings of Fact and Conclusions of Law and Order, Civil Matter No. 1780-SD, Lloyd M. Tucker vs. Clifford O. Boren Contracting Company, et al., "Respondents——

Mr. Brant: Pardon me. Would you tell me—I thought you said Paragraph 7 of the Findings——

Mr. Tucker: Appearing on Page 10.—having failed to sustain any of the defense, the petitioner is entitled to the entry of an Order of this Court directing the respondents, Clifford O. Boren, President, Clifford O. Boren Contracting Company, Inc., and Delta M. Boren, Vice President, Clifford O. Boren Contracting Company, Inc., to appear before

him and produce the following records: General Journal, Cash Journal, General Ledger, payroll records and payroll checks bearing the endorsements of any of the following named persons: Clifford O. Boren, Delta M. Boren, Marjory H. Bell, Betty K. McCarthy, and the Clifford O. Boren Contracting Company, Inc., for the period from July 1, 1951 to December 31, 1951, on Thursday, December 8, 1955, at 10:00 a.m., at 3755 Sixth Avenue, San Diego, California, and in the event of their failure so to comply, they then are ordered to be and appear before this Court at 10:00 a.m. Tuesday, December 13, 1955 in the Southern Division at San Diego, California, to show cause why they, and each of them, should not be held in civil contempt for failure so to comply. Dated this 7th day of December, 1955. William C. Mathes, United States District Judge." Now, Mr. Boren, have you brought with you today the General Ledger of the Clifford O. Boren Contracting Company, Inc.?

Mr. Boren: Yes.

Mr. Tucker: This record that Mr. Boren has in his hand, is that the record?

Mr. Boren: Yes, that's correct.

Mr. Tucker: This particular record, is that the General Ledger for the period July 1, 1951 to December 31, 1951?

Mr. Boren: Yes, it is.

Mr. Tucker: Mr. Boren, have you also brought with you the General Journal for the Clifford O. Boren Contracting Company, Inc. for that same period?

Mr. Boren: Yes, sir.

Mr. Tucker: The record which you have in your hand, is that the record called for?

Mr. Boren: Yes, it is.

Mr. Tucker: And have you brought with you the Cash Journal for the same period?

Mr. Brant: May we have a little side discussion of that record?

Mr. Tucker: Yes.

(Off-record conversation.)

Mr. Tucker: Do you have that particular record there? This record which you are showing me, Mr. Boren, is that the Cash Journal, or Daily Journal, for the period specified?

Mr. Boren: Yes.

Mr. Tucker: And have you brought with you the payroll records of the Clifford O. Boren Contracting Company, Inc. for the period July 1, 1951 to December 31, 1951?

Mr. Boren: There it is.

Mr. Tucker: Is that record which you now have before you the payroll records of the corporation for that period?

Mr. Boren: Yes, it is.

Mr. Tucker: And did you bring with you the payroll checks of the Clifford O. Boren Contracting Company, Inc. for the period July 1, 1951 to December 31, 1951, which bear the endorsements of Clifford O. Boren, Delta M. Boren, Marjory H. Bell, Betty K. McCarthy, and the Clifford O. Boren Contracting Company, Inc.?

Mr. Boren: Yes.

Mr. Brant: I should like to point out that there are 120 of these checks, the same checks as we brought before.

Mr. Tucker: Now, Mr. Boren, will you produce for examination the General Ledger which you brought with you today?

Mr. Boren: I'll have to go back to the statement of the attorney that was given at the beginning of the proceedings.

Mr. Tucker: Mr. Boren, I would like to obtain a direct answer as to whether you will or will not produce the record.

Mr. Boren: I will not, for the reasons stated in the attorney's opening statement.

Mr. Tucker: Mr. Boren, will you produce for examination the General Journal which you brought with you today?

Mr. Boren: No, sir.

Mr. Tucker: Will you produce for examination the Cash Journal which you brought with you today?

Mr. Boren: No, sir.

Mr. Tucker: Will you produce for examination the payroll records?

Mr. Boren: No, sir.

Mr. Tucker: Will you produce for examination the payroll checks?

Mr. Boren: No, sir.

Mr. Tucker: Mr. Boren, with respect to your refusal to produce for examination the records which I have described, will you state your reasons for so refusing?

Mr. Boren: All of the refusals are based on the

opening statements read by Mr. Brant.

Mr. Tucker: Mrs. Boren, will you produce for examination the General Journal of the Clifford O. Boren Contracting Company, Inc.?

Mrs. Boren: I would like to group them all together and state that I refuse to produce the records for the reasons which have already been stated by Mr. Brant, I reaffirm it.

Mr. Tucker: Mr. Boren, will you produce for examination, copying and photostating, the payroll checks of the Clifford O. Boren Contracting Company, Inc. for the period July 1, 1951 to December 31, 1951?

Mr. Boren: No, sir, for the same reason that has been stated before.

Mr. Tucker: Mrs. Boren, will you produce for examination, photostating and copying, the payroll checks of the Clifford O. Boren Contracting Company, Inc. for the period of July 1, 1951 to December 31, 1951?

Mrs. Boren: No, I will not, for the same reasons stated in the opening statement by Mr. Brant.

Mr. Tucker: Now, referring again to the case of Lloyd M. Tucker vs. Clifford O. Boren Contracting Company, Inc., Civil Matter No. 1780-SD, Findings of Fact and Conclusions of Law and Order, I am going to read to you the order appearing on Page 11: "It is hereby Ordered, Adjudged and Decreed that respondents, Clifford O. Boren, President, Clifford O. Boren Contracting Company, Inc., and Delta M. Boren, Vice President, Clifford O. Boren Contracting Company, Inc., and the Clifford O.

Boren Contracting Company, Inc., appear before Special Agent Lloyd M. Tucker on Thursday, December 8, 1955, at 10:00 a.m., at 3755 Sixth Avenue, San Diego, California, and produce for examination, copying and photostating, the records called for in summonses heretofore served upon them and then and there give testimony with respect thereto as required by the summonses, and in the event they fail so to do or give the testimony so required at that time, they are to be and appear before this Court on December 13, 1955 at 10:00 a.m. in the Southern Division at San Diego, and then and there show cause, if any they have, why they and each of them, should not be held in civil contempt of this Court and penalties assessed accordingly. Dated this 7th day of December, 1955. Signed William C. Mathes, United States District Judge." Now, Mr. Boren, I deem that you have failed to comply with this order, and Mrs. Boren, I deem that you also have failed to comply with this order, and I will so inform the Court.

I certify that the foregoing is a true and correct transcript of the proceedings had in the above entitled matter on the date specified therein, and that said transcript is a true and correct transcription of my stenographic notes.

Dated at San Diego, California, this 13th day of December, 1955.

/s/ MARIE TRAVIS,
Clerk-Stenographer

Admitted in evidence 12/13/55.

[Endorsed]: No. 15010. United States Court of Appeals for the Ninth Circuit. Clifford O. Boren, Delta M. Boren and Clifford O. Boren Contracting Co., Inc., Appellants, vs. Lloyd M. Tucker, Special Agent, Internal Revenue Service, Appellee. Transcript of Record. Appeal from the United States District Court for the Southern District of California, Southern Division.

Filed: January 26, 1956.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 15010

CLIFFORD O. BOREN CONTRACTING CO.,
INC., a California corporation, et al.,
Appellants,

vs.

LLOYD M. TUCKER, Special Agent, Internal
Revenue Service, Appellee.

STATEMENT OF POINTS ON APPEAL

Appellants herewith present points on which they claim the District Court erred:

1. The Court erred in holding that the Appellants could not assert as a defense to Appellee's petition to enforce compliance with administrative sum-

monses that previous examinations of the books and records demanded in the summonses rendered additional examination unnecessary and oppressive, and made the summonses too general and broad in scope.

2. The Court erred in holding that Appellee is entitled to photograph or photostat the books, records, papers, and payroll checks, and any portion thereof that he deems necessary.

3. The Court erred in holding that Appellee was entitled to re-examine the books and records of Appellant Clifford O. Boren Contracting Co., Inc. without having complied with the requirements of Section 7605(b) of the Internal Revenue Code of 1954.

4. The Court erred in holding that Appellee is entitled to re-examine the books and records under the authority of Section 7602 of the Internal Revenue Code of 1954 where one of the purposes of the re-examination is to obtain evidence for a possible criminal prosecution of Appellants Clifford O. Boren and Delta M. Boren.

5. The Court erred in holding that Appellee is entitled to re-examine the books and records of Appellant Clifford O. Boren Contracting Co., Inc. in connection with the tax liability of Clifford O. Boren and Delta M. Boren for the year 1950 without finding that the books and records are material and relevant to their tax liability for the year 1950.

6. The Court erred in holding that Appellants could not assert as a defense to Appellee's petition that the summonses were not issued upon probable

cause, supported by the oath or affirmation of Appellee or any other person, and that no probable cause was shown by the petition.

7. The Court erred in holding that the petition of Appellee stated a claim upon which Appellants could be held in civil contempt.

8. The Court erred in holding that Appellants had failed to sustain any of their separate defenses.

9. The Court erred in finding that Appellee was entitled to re-examine the books and records of Appellant Clifford O. Boren Contracting Co., Inc. after the expiration of the period for assessment of additional income taxes as to each Appellant.

10. The Court erred in finding that Appellee has reasonable cause to believe that Appellants may have filed false or fraudulent returns with intent to evade the tax or may have willfully attempted to defeat or evade the taxes imposed by the Internal Revenue Code for the calendar years 1950 and 1951.

11. The Court erred in finding that the tax liability of Appellants Clifford O. Boren and Delta M. Boren for the years 1950 and 1951 is now under inquiry and determination by the Internal Revenue Service.

12. The Court erred in finding that the purpose of the re-examination was to ascertain the correctness of the tax returns of Appellants Clifford O. Boren and Delta M. Boren for the years 1950 and 1951.

13. The Court erred in not finding that the purpose of the re-examination is to attempt to procure

evidence for a possible criminal prosecution of Appellants.

14. The Court erred in finding that the books and records demanded in the summonses are material and relevant to the matter of the income tax liability of Appellants Clifford O. Boren and Delta M. Boren for the calendar year 1951.

15. The Court erred in not finding that the factual basis upon which Appellee's authority to issue summonses under Section 7602 of the Internal Revenue Code of 1954 is absent.

16. The Court erred in finding that the re-examination sought by Appellee is necessary.

17. The Court erred in finding that Appellee did not have ample opportunity to examine the books and records of Appellant Clifford O. Boren Contracting Co., Inc.

18. The Court erred in finding Appellants, and each of them, in civil contempt of Court for failing and refusing to produce for examination, copying, photostating or photographing by Appellee the books and records of Appellant Clifford O. Boren Contracting Co., Inc. demanded in the summonses.

TORRANCE & WANSLEY,

/s/ By JOHN A. BRANT,

Attorney for Appellants

Affidavit of Service by Mail attached.

[Endorsed]: Filed February 2, 1956. Paul P. O'Brien, Clerk.

No. 15010

United States Court of Appeals
FOR THE NINTH CIRCUIT

CLIFFORD O. BOREN CONTRACTING
CO., INC., a California corporation;
CLIFFORD O. BOREN, President,
CLIFFORD O. BOREN CONTRACTING
CO., INC., and DELTA M. BOREN,
Vice-President, CLIFFORD O. BOREN
CONTRACTING CO., INC.,

Appellants,

vs.

LLOYD M. TUCKER, Special Agent,
Internal Revenue Service,

Appellee.

On Appeal from the United States District Court
for the Southern District of California
Southern Division

OPENING BRIEF FOR THE APPELLANTS

FILED

JUN -4 1956



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No. 15010

IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CLIFFORD O. BOREN CONTRACTING
CO., INC., a California corporation;
CLIFFORD O. BOREN, President,
CLIFFORD O. BOREN CONTRACTING
CO., INC., and DELTA M. BOREN,
Vice-President, CLIFFORD O. BOREN
CONTRACTING CO., INC.,

Appellants,

vs.

LLOYD M. TUCKER, Special Agent,
Internal Revenue Service,

Appellee.

On Appeal from the United States District Court
for the Southern District of California
Southern Division

OPENING BRIEF FOR THE APPELLANTS

OPINION BELOW

The Findings of Fact and Conclusions of Law [R. 48-62]
of the District Court are not officially reported.

Appellants to appear before the Court and produce for examination, copying and photostating or photographing the records called for in the summonses. [R. 74]

Appellants appeared before the District Court, as directed, and produced said records, but failed and refused to obey the order of the Court commanding them to produce said records for examination, copying and photostating or photographing. Thereupon, the District Court found Appellants, and each of them, in contempt of the District Court and committed Appellants Clifford O. Boren and Delta M. Boren to the custody of the United States Marshal and assessed a compensatory fine of \$110.00 against Appellant Corporation. [R. 76]

Jurisdiction is conferred on this Court by 28 U.S.C., Section 1291. The order is final and appealable. *Chapman v. Goodman*, U.S. Court of Appeals, Ninth Circuit, 219 F. 2d 802.

Appellants filed notice of appeal on December 13, 1955. [R. 81]

Appellants made a cash deposit of \$1,000.00 in lieu of a supersedeas bond, which was approved by the Court, [R. 72] and the Court made its order staying execution of the judgment. [R. 79]

On January 3, 1956, Appellants filed a designation of contents of record on appeal and reporter's transcripts of proceedings. On January 13, 1956, Appellee filed an additional designation of contents of record on appeal.

The record was prepared by the Clerk of the United States District Court, who filed the same with the Clerk of the United States Court of Appeals for the Ninth Circuit on January 26, 1956. [R. 82, 215] Appellants filed a statement of points on appeal in the United States Court of Appeals for the Ninth Circuit on February 2, 1956. [R. 218]

QUESTIONS PRESENTED

1. Whether in an action to enforce administrative summonses *duces tecum* issued by a special agent of the Internal Revenue Service, a defense is sufficient which alleges facts showing that because of previous examinations the examination sought by the summonses is unnecessary and unreasonable in scope.

2. Whether a Revenue Agent who has made a complete and detailed examination of a taxpayer's books and records, and has had full opportunity to examine the books and records, and they were repeatedly made available to him, may make a re-examination of such records in connection with the same taxpayers and taxable years, without the Secretary of the Treasury, or his delegate, requiring it (a) after investigation, and (b) when it is a necessity, and (c) after written notice, all of which are required by Section 7605(b), IRC 1954.

3. Whether under Section 7602, IRC 1954, which authorizes a Revenue Agent to "examine" a taxpayer's books and records, a Revenue Agent, after making a detailed examination of the books and records, may require that they be photographically reproduced for his further use.

4. Whether under Section 7602, IRC 1954, which authorizes a Revenue Agent to examine a taxpayer's books of account for the purpose of ascertaining the correctness of an income tax return, this authority also permits a Revenue Agent to make an examination for the admitted purpose of securing evidence for a criminal prosecution.

5. Whether the authority in Section 7602, IRC 1954, to examine books and records is limited to those which are material or relevant to the inquiry into the correctness of the return under investigation, and if so, whether Appellee has sustained his burden of proving that the books and records which he demands are material or relevant to the tax liability of the persons liable therefor and that the books and records contain items relating to the business of the person liable for the tax.

6. Whether an examination of a taxpayer's books and records is permitted after the expiration of the Statute of Limitations without a definite factual showing that fraud is the issue of the renewed inquiry.

7. Whether the failure to comply with an administrative summons is contemptuous conduct so that in an action to enforce such summons an order to show cause why the summoned person should not be held in civil contempt for failure to obey such summons states a claim upon which such person could be held in civil contempt.

STATUTES INVOLVED

The pertinent statutes are printed in the Appendix, *infra*.

STATEMENT

Appellants Clifford O. Boren and Delta M. Boren are president and vice-president, respectively, of Appellant Clifford O. Boren Contracting Co., Inc., a California corporation. Appellee, Lloyd M. Tucker, is a Special Agent of the Internal Revenue Service. [R. 49]

Agents of the Bureau of Internal Revenue commenced the examination of the Federal Income Tax Returns of Appellants Clifford O. Boren and Delta M. Boren for the taxable years 1950 and 1951 on or about November 2, 1953. [R. 108] Internal Revenue Agent Henry Miller and Internal Revenue Agent Charles D. Ford were engaged in the examination. [R. 118] On or about April 28, 1954, Internal Revenue Agent Charles D. Ford requested that a Special Agent be assigned to co-operate in the investigation and on or about May 11, 1954 Appellee was so assigned. [R. 108]

Internal Revenue Agent Charles D. Ford resigned from the service on September 10, 1954. On October 6, 1955, Appellant Delta M. Boren, through her attorneys, reported irregularities on the part of Internal Revenue Agent Ford after he had left the service. [R. 108-109] On October 6, 1955 the case was reassigned to Internal Revenue Agent Forrest P. Calkins. [R. 108] On October 20, 1954, Appellee and Internal Revenue Agent Forrest P. Calkins communicated with Appellants' counsel. [R. 11] At that time Internal Revenue Agent Calkins stated that he wanted to start from "scratch." [R. 109] Appellee commenced his examination of the tax liability of Appellants Clifford O. Boren and Delta M. Boren for the years 1950 and 1951 on

October 20, 1954. [R. 11] On or about December 7, 1954 Appellee and Revenue Agent Calkins commenced the examination of the returns of Appellants Clifford O. Boren and Delta M. Boren for the years 1950-1951. [R. 109] On that date Appellee and Revenue Agent Calkins demanded that Appellant Corporation make available to them the books, papers, records and other data of Appellant Corporation for the fiscal year July 1, 1951 to April 30, 1952, to be used by them in ascertaining the tax liability of Appellants Clifford O. Boren and Delta M. Boren for the years 1950 and 1951, and in the examination of the tax liability of Appellant Corporation for the fiscal year ended April 30, 1952. [R. 109] During the period December 7, 1954 to July 15, 1955, the books and records of Appellant Corporation were continuously under examination by Appellee and Revenue Agent Calkins for the purpose of ascertaining the tax liability of each of the Appellants for said taxable years. [R. 51, 59]

In the conduct of the examination of Appellant Corporation's books and records in connection with the matter of the tax liability of Appellants Clifford O. Boren and Delta M. Boren and Appellant Corporation, Appellee and Revenue Agent Calkins had available for examination, and did examine, the general journal, cash journal, general ledger, payroll records, and *all* of the payroll checks of Appellant Corporation for the period July 1, 1951 to April 30, 1952. [R. 52] Revenue Agent Calkins examined and made extensive notes and transcripts from said books and records, and the payroll records and checks and made abstracts of information from these records and checks. [R. 52]

Appellee had full opportunity to make a complete examination of the payroll checks. [R. 120]

In the examination of the payroll checks by Appellee, Appellee extracted therefrom the dates of the checks, the names of the payees, the bank endorsements, the names of individuals appearing on the reverse side of the checks, the amount of the checks, and the bank on which the checks were drawn. [R. 136-137]

Appellee and Revenue Agent Calkins were examining the payroll checks in February, 1955. Based upon information obtained from the checks they conducted further investigation. [R. 140] During the course of the investigation, and sometime in March, 1955, Appellee was informed that one of the persons carried on the payroll of Appellant Corporation as an employee and with respect to whom the payroll records indicated weekly payroll checks had been issued during the period June 29, 1951 to December 5, 1951, was not an employee of the Corporation and did not receive the wages shown as paid to her in the books and records. [R. 52] Since receiving that information, Appellee did not obtain any further information in derogation of the payroll deductions. [R. 128]

The Commissioner of Internal Revenue has issued Notices of Deficiencies for Clifford O. Boren and Delta M. Boren for the taxable year 1951. In said Notices of Deficiencies, fraud penalties were asserted. On or about July 22, 1955 the taxes, interest and fraud penalties proposed in said notices were assessed by the Commissioner. [R. 56] The Notices of Deficiencies were based upon the informa-

tion obtained by Appellee and Revenue Agent Calkins in the examination of the books and records of Appellant Corporation, and upon the information obtained by Appellee in the examination of the payroll records and checks. [R. 126, 128] The Notices of Deficiencies contained adjustments made as a result of the information obtained concerning the “employee” above mentioned. [R. 44, 128] On July 15, 1955, the Commissioner of Internal Revenue issued a Notice of Deficiency to Appellant Corporation for the fiscal year July 1, 1951 to April 30, 1952. Included within the deductions disallowed by said Notice of Deficiency are the salaries and wages of the “employee” referred to above. [R. 44]

During the period between March, 1955 to July 15, 1955 the books and records now sought by Appellee were available to Appellee for examination. [R. 141] These records remained available to Appellee and Revenue Agent Calkins until they informed Appellants’ counsel that they were finished with them. [R. 42, 110] On July 11, 1955, Appellee again requested all the payroll checks and records of Appellant Corporation for the fiscal year July 1, 1951 to April 30, 1952. Said checks and records were delivered to Appellee and Revenue Agent Calkins on July 13, 1955. When the payroll records and payroll checks were again delivered to Appellee and Revenue Agent Calkins, they demanded possession thereof for the purpose of photographically reproducing said records. This demand was refused and Appellee and Revenue Agent Calkins thereupon stated that they did not need to examine said records. [R. 140-141]

On July 20, 1955, Appellee again demanded examination

of said payroll records and checks. At this time a Notice of Deficiency had been issued by the Commissioner to each Appellant. Appellee acknowledged that he did not want to examine the records and checks for the purpose of adjusting or changing the Notice of Deficiency. [R. 57-58]

Appellee testified that his principal purpose in seeking this examination was to photograph or photostat certain of the payroll checks to determine the validity of the endorsements on those checks, and, whether there had been forgeries of those checks. [R. 130] In issuing the summonses, one of the purposes which Appellee had in mind was assisting in the preparation of a criminal case against Appellants Clifford O. Boren and Delta M. Boren. [R. 134]

Counsel for Appellee admitted, after the filing of Appellee's petition and prior to the hearing thereon, that the copying of the payroll checks, either photographically or through some photostatic process, would make unnecessary any further investigation by Appellee into the books and records of Appellant Corporation. [R. 147]

On August 25, 1955, Appellee issued summonses to Appellants to appear before Appellee to testify and to produce for examination the General Journal, Cash Journal, General Ledger, Payroll Records and Payroll Checks bearing the endorsement of any of the following named persons: Clifford O. Boren, Delta M. Boren, Marjorie H. Bell, Betty K. McCarthy, and the Clifford O. Boren Contracting Company, Inc., for the period from July 1, 1951 to December 31, 1951, in the matter of the tax liability of Appellants Clifford O. Boren and Delta M. Boren for the

calendar years 1950 and 1951. [R. 50, 53] Appellants had possession, care and custody of said books and records. [R. 49-50]

A joint income tax return of Appellants Clifford O. Boren and Delta M. Boren for the calendar year 1950 was filed on or prior to March 15, 1951. These Appellants signed a waiver of the Statute of Limitations for the calendar year 1950, which waiver extended the time for assessment to June 30, 1955. [R. 55] Appellants Clifford O. Boren and Delta M. Boren made and filed income tax returns for the calendar year 1951 on or prior to March 15, 1952.

The lower court found that Appellee has reasonable cause to believe that Appellants Clifford O. Boren and Delta M. Boren may have filed for the calendar years 1950 and 1951 false or fraudulent returns with intent to evade the tax or may have willfully attempted to defeat or evade the taxes imposed by the Internal Revenue Code. [R. 50, 59] The lower court also found that the purpose of Appellee's examination was to determine the correctness of the tax returns filed by Appellants Clifford O. Boren and Delta M. Boren with respect to possible assertion of additional assessments by reason of fraud and fraud penalty assessments and with respect to possible criminal tax liability of said Appellants. [R. 58]

The lower court also found that the books and records sought by the summonses are material and relevant to the matter of the income tax liability of Appellants Clifford O. Boren and Delta M. Boren for the calendar year 1951. [R. 59, 60] The lower court did not find that said books

and records were material and relevant to the matter of the income tax liability of said Appellants for the calendar year 1950.

None of the Appellants has requested a re-examination of Appellant Corporation's book of account. Neither the Secretary of the Treasury, nor his delegate, after investigation, has notified Appellant Corporation in writing that an additional examination is necessary.

Appellee moved to strike all of Appellants' separate defenses set forth in their answer to Appellee's petition on the ground that the separate defenses were "wholly irrelevant" to the issues presented. [R. 115] The lower court granted Appellee's motion to strike from the answer the Second and Ninth separate defenses and denied the motion as to the other separate defenses, Third to Eighth, inclusive. [R. 75-76]

ARGUMENT

I

IN AN ACTION TO ENFORCE ADMINISTRATIVE SUMMONSES DUCES TECUM ISSUED BY A SPECIAL AGENT OF THE INTERNAL REVENUE SERVICE, A DEFENSE IS SUFFICIENT WHICH ALLEGES FACTS SHOWING THAT BECAUSE OF PREVIOUS EXAMINATIONS, THE EXAMINATION SOUGHT BY THE SUMMONSES IS UNNECESSARY AND UNREASONABLE IN SCOPE.

Appellee repeatedly had available for examination and did examine and make extensive notes and transcripts

from the books and records now sought by his summonses. The examination was made by him in connection with the tax liability of Appellants Clifford O. Boren and Delta M. Boren for 1950-1951, and Appellant Corporation for the fiscal year ended April 30, 1952. The only records which Appellee in fact wants to examine are the payroll checks described in the summonses. These checks likewise were repeatedly made available to Appellee for examination, and were extensively examined by him. These facts were alleged in Appellants' Second Separate Defense. [R. 19-24]

It is Appellants' contention here that the facts alleged in this defense show that because of the nature and extent of the previous examinations of the books and records, the further examination sought by the summonses is unnecessary, and is unreasonable in scope. The lower court granted Appellee's motion to strike this defense, apparently on the ground that it did not allege facts sufficient to constitute a defense. [R. 75-76]

Section 7605(b) of the Internal Revenue Code provides: "No taxpayer shall be subjected to unnecessary examination or investigations, . . ." The language of the present Section 7605(b) has been substantially the same since its first enactment in the Revenue Act of 1921 and decisions interpreting the prior enactments should be applicable to the present provision.

The meaning of this section is reasonably clear. Unnecessary examinations are forbidden. This prohibition is addressed to the Secretary of the Treasury under whose authority all examinations are made. The prohibition is a Congressional safeguard of the right to be free from un-

necessary examinations and is stated in absolute terms. This right is further fortified by the additional provision contained in Section 7605(b) that “. . . only one inspection of a taxpayer's books of account shall be made for each taxable year unless the taxpayer requests otherwise, or unless the Secretary, or his delegate, after investigation, notifies the taxpayer in writing that an additional inspection is necessary.” *Pacific Mills v. Kenefick*, 99 F. 2d 188 (CCA-1)

Even where the Secretary or his delegate has given written notice that a second examination is necessary, he may not make a second examination unless such examination is in fact necessary. The Secretary or his delegate clearly has no right to impose additional examinations in disregard of the statute and an examination ordered by the Secretary without any necessity therefor is an arbitrary abuse of power. *Pacific Mills v. Kenefick*, 99 F. 2d 188 (CCA-1)

Section 7602, IRC 1954, as here applicable, provides that the Secretary or his delegate is authorized to make an examination “For the purpose of ascertaining the correctness of any return . . .” The necessity for the additional examination sought by Appellee must be judged with this purpose in mind.

The facts alleged in Appellants' Second Separate Defense show that the additional examination is not for the stated purpose and is not necessary.

The granting of Appellee's motion to strike this defense was inconsistent with the lower court's own obser-

vation in connection with Appellee and his prior examinations of the records: "If he had them twice available the burden is on petitioner to show a necessity for a third examination." [R. 135] Appellants respectfully submit that the allegations in Appellants' Second Separate Defense, if true, demonstrate a lack of necessity for the additional examination by Appellee and constitute a proper defense to Appellee's petition.

Martin v. Chandis Security Co., 128 F. 2d 731, CCA-9 Local 174, *International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America et al.*, v. U. S.,.....F. 2d....., CCA-9, No. 14,746, December 7, 1955.

The previous examinations by Appellee render the summonses too broad in scope. Since Appellee has conducted a comprehensive examination into the books and records now sought, he is in a position to specify with particularity the items and documents he needs to examine. A general exploratory examination is not justified under the circumstances. Appellee should be required to specify the individual items and documents which he now needs to examine. This would permit a critical and intelligent examination of the specific items and documents to determine if they contain entries relative to the business of the Borens and whether such entries are material or relevant to their tax liability.

Appellants have alleged that the only records which Appellee wants to examine are the payroll checks specified in the summonses. [R. 23-24] This was admitted by counsel for Appellee. [R. 147]

In view of these circumstances, the summonses are too broad in scope and are oppressive. This is a proper defense to an action to enforce administrative summonses.

Martin v. Chandis Securities Co., 33 F. Supp. 478

Local 174, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America et al., v. U. S., F. 2d, CCA-9, No. 14, 746, December 7, 1955.

II

WHERE A REVENUE AGENT HAS MADE A COMPLETE AND DETAILED EXAMINATION OF A TAXPAYER'S BOOKS AND RECORDS, AND HAS HAD FULL OPPORTUNITY TO EXAMINE THE BOOKS AND RECORDS, AND THEY WERE REPEATEDLY MADE AVAILABLE TO HIM, A RE-EXAMINATION OF SUCH RECORDS IN CONNECTION WITH THE SAME TAXPAYERS AND TAXABLE YEARS MAY NOT BE MADE UNLESS THE SECRETARY OF THE TREASURY, OR HIS DELEGATE, REQUIRES IT (A) AFTER INVESTIGATION, AND (B) WHEN IT IS A NECESSITY, AND (C) AFTER WRITTEN NOTICE, ALL OF WHICH ARE REQUIRED BY SECTION 7605(b), IRC 1954.

Section 7605(b) provides that “. . . only one inspection of a taxpayer's books of account shall be made for each taxable year unless the taxpayer requests otherwise or unless the Secretary or his delegate, after investigation, notifies the taxpayer in writing that an additional inspection is necessary.”

None of the Appellants has requested a re-examination. Neither the Secretary of the Treasury, nor his delegate, after investigation, has notified Appellant Corporation in writing that an additional examination is necessary. [R. 58]

A complete and detailed examination of the books of account of Appellant Corporation has been made by Appellee and Revenue Agent Calkins in connection with the tax liability of Appellants Clifford O. Boren and Delta M. Boren for the calendar years 1950-1951, and in connection with the tax liability of Appellant Corporation for the fiscal year ended April 30, 1952.

As a result of these examinations, Notices of Deficiency were issued to each of the Appellants, and in each notice, a fraud penalty was asserted. Appellee testified that since receiving information about an "employee" of Appellant Corporation in March, 1955, he has obtained no other information in derogation of the payroll deductions. The examination sought by Appellee is not for the purpose of changing the Notice of Deficiency.

Only one inspection of a taxpayer's books of account for each year shall be made unless the Secretary requires it (a) after investigation, and (b) when it is a necessity, and (c) after written notice.

Not only has there been no notice as required by Section 7605(b), but there is also no evidence of any investigation subsequent to the examination of the books and records, and no evidence that the re-examination is necessary for the purpose of determining the correctness of the returns of Appellants.

The Secretary of the Treasury has no authority to impose examinations in disregard of this statute. Even if a notice were given by the Secretary, unless there is a necessity for the examination, there is an arbitrary abuse of power. *Pacific Mills v. Kenefick*, 99 F. 2d 188, (CCA-1)

The prohibitions of Section 7605(b) apply equally to examinations of the books and records of the person liable for the tax and examinations of books and records of a person other than the one liable for the tax. These prohibitions are a limitation upon the power of the Treasury Department and not merely a right assertable only by the person against whom a tax liability is being investigated. The Ninth Circuit Court in *Martin v. Chandis Securities Co.*, 128 F. 2d 731, said (at 128 F. 2d 735) as to the limitation imposed by this section (then section 3631):

“The question is whether in investigating the return of one taxpayer, the Bureau may investigate the books of a third person regardless of whether the investigation is necessary or not. In other words, is Section 3631 a limitation on the power of the Bureau, or is it merely a personal right available only to the taxpayer? We believe it is the former and that the Bureau has no power to make an unnecessary examination or investigation.”

See also *In the Matter of Clarence Wood and Mary L. Wood*, (U.S. District Court, WD of Ky.) 130 F. Supp. 121, where the Court adopted the view expressed in *Martin v. Chandis Securities Co.*, supra, and said that “. . . whatever limitations upon the Bureau’s power have been placed in the statute apply to all persons thus subpoenaed.”

Appellee's petition refers only to the tax liability of Clifford O. Boren and Delta M. Boren. [R. 4] However, Appellee summoned Appellants Clifford O. Boren, Delta M. Boren and Appellant Corporation. [R. 5] It is clear from the affidavit of Appellee in support of his petition that the examination sought by him relates also to the Appellant Corporation. [R. 35, 59] The prohibitions of Section 7605(b) would therefore be applicable whether the examination sought is considered to be an examination of the books of account of the person liable for the tax or the books of account of a third party.

The question arises as to whether or not there has been "one inspection" of Appellants' books of account for the fiscal year ended April 30, 1952, as that term is used in Section 7602.

Admittedly a detailed, extensive examination was made. The records now sought were carefully examined by Appellee and Revenue Agent Calkins. They were repeatedly made available to them. Detailed abstracts were made. Based upon information thereby obtained, Notices of Deficiency were issued, which asserted deficiencies and fraud penalties. These notices are determinations of the tax liabilities of Appellants. The deficiencies asserted for the year 1951 against Appellants Clifford O. Boren and Delta M. Boren have been assessed. The normal three year statute of limitations had run prior to the time Appellee issued his summonses. Is this "one inspection of a taxpayer's books of account"? Appellee says no and the lower court concluded that it was not. This conclusion was based upon Appellee's assertion, otherwise

unsupported, that the examination of Appellants' books of account had not been completed. [R. 140]

The import of the lower court's conclusion is that so long as a revenue agent is willing to assert that his examination is not completed, one inspection of a taxpayer's books of account has not been made and the restrictions imposed by Congress are inapplicable. This has the result of abrogating the statutory prohibitions and permitting the person who is to exercise the power to be the judge of the length and breadth of this authority. On the theory asserted by Appellee and adopted by the lower court, Appellants could be subjected to repeated and continued examinations for as long as any revenue agent desired to pursue Appellants. This would be without limitation as to time for there can never be a "final determination" of a tax liability for a taxable year if at any time fraud is asserted.

Appellants respectfully suggest that the limitation of "one inspection" of a taxpayer's books of account is not to be determined by the subjective standard of the revenue agent's desires, but rather from the nature and extent of the actual examination made.

The zeal of revenue agents, regardless of how motivated, is commendable but it should be exerted within the statutory framework. It must be recalled that the principles expressed in the Fourth and Fifth Amendments to the Constitution of the United States were conceived as a result of the abuses the colonists experienced with revenue officers.

III

WHERE SECTION 7602, IRC 1954, AUTHORIZES A REVENUE AGENT TO “EXAMINE” A TAXPAYER’S BOOK AND RECORDS, THE REVENUE AGENT MAY NOT AFTER MAKING A DETAILED EXAMINATION OF THE BOOKS AND RECORDS REQUIRE THAT THEY BE PHOTOGRAPHICALLY REPRODUCED FOR HIS FURTHER USE.

Appellee’s sole purpose in issuing the summonses to Appellants was to force Appellants to have the payroll checks described in the summonses photographically reproduced for Appellee’s further use.

Appellee had been engaged in the examination of Appellant Corporation’s books and records continuously since December 7, 1954. [R. 59] He had full opportunity to examine the payroll checks. [R. 120] Appellee had available for examination, and did examine extensively, *all* of the books and records sought by the summonses. [R. 51-52] Abstracts were made of all information contained on the checks. [R. 136-137] Adjustments to the income tax returns of each of the Appellants were made based upon information obtained by Appellee and Revenue Agent Calkins in the examination, [R. 44, 128] and such adjustments included adjustments based upon the information as to the “employee” of Appellant Corporation contained in Appellee’s affidavit. [R. 44, 35] The Notices of Deficiency for each Appellant asserted a fraud penalty.

The information obtained by Appellee relative to this “employee” of Appellant Corporation, and on which Ap-

appellee hangs the necessity for the additional examination of the payroll records and checks, was obtained by Appellee in the month of March, 1955. [R. 140] The payroll records and checks were available for examination and examined from February, 1955, and for a considerable period thereafter. [R. 141] They were again requested on July 11, 1955, and delivered on July 13, 1955. [R. 141] At that time Appellee and Revenue Agent Calkins demanded the right to copy or photostat said checks. [R. 141-142] This demand was refused and Appellee and Revenue Agent Calkins stated that they did not need to examine the payroll records and checks. [R. 141]

Counsel for Appellee admitted after the filing of Appellee's petition, and prior to the hearings thereon, that the copying of the payroll checks, either photographically or through some photostatic process, would make unnecessary any further investigation by Appellee into the books and records of Appellant Corporation. [R. 147] Appellee testified at the hearing on his petition that it was his principal purpose in the examination sought by the summonses to photograph or photostat certain of the payroll checks to determine the validity of the endorsements on those checks and whether there had been forgeries. [R. 130]

The Appellee's position was aptly summarized by the lower court:

“The Court: The petitioner says here that he never did finish, that he finally went to you, as I understand it, and he had this idea — he was tardy, yes — but he had the idea that he had better photostat these endorsements, and you said no.” [R. 152]

Section 7602 authorizes the Secretary or his delegate “For the purpose of ascertaining the correctness of any return . . . (1) To *examine* any books, papers, records or other data which may be relevant or material to such inquiry; (2) To summon . . . any person having the possession, custody, or care of books of account containing entries relating to the business of the person liable for the tax . . . , to appear before the Secretary or his delegate at a time and place named in the summons and produce such books, papers, records, or other data, and to give such testimony, under oath, as may be relevant or material to such inquiry; . . .”

This section provides a method for securing the production of books and records before the Secretary or his delegate and authorizes the examination of such books and records.

Nowhere is there authority for Appellee to demand the right to photographically reproduce Appellants' books and records. Examination means to inspect. Section 7605(b) provides that a taxpayer shall not be subjected “to unnecessary examination” and further provides that “only one *inspection* of a taxpayer's books of account shall be made for each taxable year . . .” The right to photographically reproduce a taxpayer's books of account is tantamount to the right to seize such books of account. Section 7602 does not authorize a seizure.

It is clear that Congress did not intend to authorize the Secretary or his delegates to seize a taxpayer's books of account under the authority of Section 7602, since specific provision was made in the Internal Revenue Code for

seizures. Section 7607(b) of the Internal Revenue Code of 1954 provides: "For provisions relating to — (1) Searches and seizures see Rule 41 of the Federal Rules of Criminal Procedure." If in connection with an investigation it becomes necessary to seize the taxpayer's books and records, the Secretary or his delegate must follow the process set forth in Rule 41, and the safeguards therein provided. Subparagraph (g) of Rule 41 specifically provides that the term "property," as used in Rule 41, includes documents, books and papers.

A similar question arose in *U.S. v. Kraus*, 270 F. 578, (D.C.S.D. New York) where in an opinion by Judge Learned Hand in a case arising under the National Prohibition Act, it was held that the right given to revenue agents to inspect a taxpayer's records did not give them the additional right either to seize the records or to make copies without the taxpayer's consent.

The decisions of *U.S. v. Sherry*, 294 F. 684, (U.S.D.C. D.D. Ill.) and *Sellmayer Packing Co. v. Comm.*, 146 F. 2d 707, (CCA-4) appear to be contrary holdings. However, in the first case the seizure was made with consent, or without objection. In the second case, there was no objection to seized sales slips at time of trial, the evidence was cumulative, and it was established that there was an imminent possibility of destruction of the seized records.

IV

SECTION 7602, IRC 1954, AUTHORIZES A REVENUE AGENT TO EXAMINE A TAXPAYER'S BOOKS OF ACCOUNT FOR THE PURPOSE OF ASCERTAINING THE CORRECTNESS OF AN INCOME TAX RETURN. THIS AUTHORITY DOES NOT PERMIT A REVENUE AGENT TO MAKE AN EXAMINATION FOR THE ADMITTED PURPOSE OF SECURING EVIDENCE FOR A CRIMINAL PROSECUTION.

The examination being conducted by Appellee was for the admitted purpose of investigating possible criminal prosecution of Appellants. [R. 124] Appellee testified that in issuing the summonses one of the purposes which he had in mind was assisting in the preparation of a criminal case. [R. 134]

The fact that Appellee did not want to re-examine the records and checks for the purpose of adjusting or changing the Notice of Deficiency; that adjustments had been made to the income taxes of Appellants, and fraud penalties asserted, based upon the subject payroll records and checks; that his principal purpose in issuing the summonses was to photograph certain payroll checks to determine the validity of the endorsements; his counsel's admission that once photographic reproductions of the checks were made, further investigation by Appellee would be unnecessary; together with the nature and extent of the previous examinations, all point to the conclusion that the primary, if not sole, purpose of Appellee in issuing the summonses was to obtain information for a criminal prosecution.

The authority granted by Section 7602 is specifically limited to the purposes of ascertaining the correctness of any return, making a return where none has been made, determining the liability of any person for any internal revenue tax, or transferee liability, or collecting any such liability. To permit this authority to be exercised for the purpose of securing evidence for a criminal prosecution would sanction a perversion of the authority granted.

In holding that a summons issued by a Special Agent of the Internal Revenue Service under Section 3614 of the Internal Revenue Code of 1939 [now Section 7602, IRC 1954] could not be used where *at least one* of the admitted purposes was to aid the Department of Justice in the prosecution of a criminal case, the United States District Court in *United States v. O'Connor*, 118 F. Supp. 248, (U.S.D.C. D. Mass. 1953) stated:

“So far as this Court knows, Congress has never in criminal matters vested the executive with an unrestricted subpoena power to uncover information which might aid in the enforcement of criminal statutes and the preparation of criminal cases . . .

“The Constitution of the United States, the statutes, the traditions of our law, the deep rooted preferences of our people speak clearly. They recognize the primary and nearly exclusive role of the Grand Jury as the agency of compulsory disclosure. That is the inquisitorial body provided by our fundamental law to subpoena documents required in advance of a criminal trial, and in the preparation of an indictment or its particularization. See *Hale v. Henkel*, 201 U.S. 43, 26 S. Ct. 370, 50 L.Ed. 652.

“To encourage the use of administrative subpoenæ as a device for compulsory disclosure of testimony to be used in presentments of criminal cases would diminish one of the fundamental guarantees of liberty. Moreover, it would sanction perversion of a statutory power. The power under Sec. 3614 [now 7602] was granted for one purpose, and is now sought to be used in a direction entirely un contemplated by the lawgivers. The limitations implicit in every grant of power are that it will be used not colorably, but conscientiously for the realization of those specific ends contemplated by the donors of the power.”

V

THE AUTHORITY IN SECTION 7602, IRC 1954, TO EXAMINE BOOKS AND RECORDS IS LIMITED TO THOSE WHICH ARE MATERIAL OR RELEVANT TO THE INQUIRY INTO THE CORRECTNESS OF THE RETURN UNDER INVESTIGATION. APPELLEE HAS FAILED TO SUSTAIN HIS BURDEN OF PROVING THAT THE BOOKS AND RECORDS WHICH HE DEMANDS ARE MATERIAL OR RELEVANT TO THE TAX LIABILITY OF THE PERSONS LIABLE THEREFOR AND THAT THE BOOKS AND RECORDS CONTAIN ITEMS RELATING TO THE BUSINESS OF THE PERSON LIABLE FOR THE TAX.

Section 7602, IRC 1954, requires that the books and records to be examined be material or relevant to the inquiry into the correctness of the return. In an action to

enforce an administrative summons issued under Section 7602, the burden is upon the revenue agent in the first instance to show that the demand is reasonable under all the circumstances and to prove that the books and records which he demands are material or relevant to the tax liability of the person liable therefor and that the books and records contain items relating to the business of the person liable to the tax.

Local 174, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, et al v. U.S., F. 2d, CCA-9, No. 14, 746, December 7, 1955.

Appellee alleged in his petition that the books and records sought by the summonses for the period July 1, 1951 to December 31, 1951 were material and relevant to the inquiry into the tax liability of Clifford O. Boren and Delta M. Boren for the calendar years 1950 and 1951. [R. 4 and 5] This was put in issue by Appellants. [R. 19-20] The lower court found that said books and records were material and relevant to the matter of the tax liability of Clifford O. Boren and Delta M. Boren for the calendar year 1951. [R. 60] No finding was made as to the materiality or relevancy for the calendar year 1950. The lower court concluded as a matter of law that Appellee was entitled to examine said books and records in connection with the calendar years 1950 and 1951.

It is Appellants' contention here that the court erred in concluding (1) that the books and records could be examined in connection with the year 1950; and (2) in finding from the evidence that the books and records were mate-

rial and relevant to the tax liability of Clifford O. Boren and Delta M. Boren for the calendar year 1951.

No evidence was introduced by Appellee showing in what manner, or at all, the books and records sought related to the tax liability of Clifford O. Boren or Delta M. Boren for the year 1950. The court did not find the records to be material or relevant for that year. The court's conclusion of law that Appellee is entitled to examine the books and records in connection with the year 1950 is therefore without foundation.

In connection with the year 1951, it was Appellee's obligation to prove that the books and records (1) contained entries relating to the business of Clifford O. Boren and Delta M. Boren for the year 1951, and (2) that the items or documents sought, and each of them, were material or relevant to the tax liability of both Clifford O. Boren and Delta M. Boren for the year 1951.

The evidence on the issue of materiality or relevancy introduced by Appellee consists of Appellee's affidavit, [R. 33-35] his testimony in response to questions by the Court, [R. 138-139] and the testimony of Revenue Agent Forrest P. Calkins. [R. 143-145]

The facts set forth in Appellee's affidavit, disregarding his speculations and conclusions, may be stated as follows: During the course of Appellee's investigation, he was informed that one of the persons carried as a salaried employee in the 1951 payroll account of Appellant Corporation was not employed by any of the Appellants. This "employee" performed no service for any of the Appellants

and rarely appeared on the premises of Appellant Corporation. An examination of Appellant Corporation's payroll records disclosed that Appellant Corporation carried the "employee" as a full time employee at 40 hours per week during the latter half of 1951. Weekly payroll checks issued by Appellant Corporation to the "employee" for the period June 29 to December 5, 1951 disclosed endorsements by the "employee" and Delta Boren. Appellee examined an income tax return filed in the name of the "employee" for the year 1951 which reported that the "employee" was paid the sum of \$2,817.97 from Appellant Corporation as salary or wages. The "employee" denied under oath that she signed and filed or caused to be filed said return and denied working for either Appellant Corporation or Clifford O. Boren for more than 10 or 12 days in 1951.

For these facts to affect the tax liability of Appellants Clifford O. Boren and Delta M. Boren for the year 1951, it would be necessary to infer that the sums paid to the "employee" were not received by the employee, and further that such sums were received by Clifford O. Boren and Delta M. Boren. There is no evidence that the employee did not receive the checks or the amounts represented thereby. This cannot be reasonably inferred from her denial that she filed the tax return. There is no evidence that any part of the moneys paid to the employee was received by Clifford O. Boren or Delta M. Boren. The fact that the checks contained the endorsement of Appellant Delta M. Boren after the endorsement of the employee does not permit an inference that Appellant Delta M. Boren received any of the money. *A fortiori* no inference

could be made that Appellant Clifford O. Boren received any of the money.

Re-examination of the books and records would not determine these questions. They can be determined only by examination of the employee and Appellants Clifford O. Boren and Delta M. Boren.

Appellants attempted to examine Appellee in connection with the materiality of the examination sought by him. Appellants were immediately met with the strenuous assertion that the information was confidential. [R. 119] The confidential information of a revenue agent must, of course, be protected. However, we cannot lose sight of the fact that this is an ordinary lawsuit with each party bearing the burden of establishing by evidence the facts which he asserts give him the cause of action or defense. Although we occasionally find a Court making an inference from the assertion of the testimonial privileges of the Fifth Amendment, it is incongruous to take the position that a plaintiff can establish the most material fact in his case by asserting the existence of — but withholding — information which he deems confidential.

From Appellee's testimony in response to inquiries by the Court, it is obvious that Appellee had no knowledge of anything contained in the books and records which would be either material or relevant to the inquiry which he asserts he is making. [R. 138]

Revenue Agent Calkins in his testimony was a little more knowledgeable, but still did not disclose the existence in the books and records sought of anything material or

relevant to inquiry into the tax liability of Clifford O. Boren and Delta M. Boren for the years 1950-1951. [R. 143-145]

It must also be noted that the lower court had the books and records before it. [R. 92] No examination of any kind was made by the Court of these books and records.

VI

NO EXAMINATION OF A TAXPAYER'S BOOKS AND RECORDS IS PERMITTED AFTER THE EXPIRATION OF THE STATUTE OF LIMITATIONS WITHOUT A DEFINITE FACTUAL SHOWING THAT FRAUD IS THE ISSUE OF THE RENEWED INQUIRY.

At the time Appellee issued his summonses, the period within which income taxes could be assessed, in the absence of fraud or a 25% omission from gross income, had expired for the calendar year 1951 as to Appellants Clifford O. Boren and Delta M. Boren. [R. 55]

Section 275(a) and (c) and Section 276(a),
Internal Revenue Code of 1939.

No examination is permitted of a taxpayer's books after three years has elapsed from the filing of a return, unless there is a definite factual showing that fraud is the issue in the renewed inquiry. This showing must be made for each of the years involved, and as to each of the taxpayers involved.

“Appellant’s [Commissioner’s] rights, if any, are statutory, and to obtain the relief granted by the statute he must bring himself within the terms thereof . . . An exception to the statute of limitations mentioned above provides no period of limitation on the collection of taxes in the case ‘of a false or fraudulent return with intent to evade tax’ . . . There is no allegation in the complaint, either specifically or of facts showing, that the return of the wife for 1930 was false or fraudulent and made with intent to evade tax.”

Martin v. Chandis Securities Co., (CCA-9),
128 F. 2d 731.

It is Appellee’s position that he has made a definite factual showing on fraud and therefore the statute of limitations has no applicability. [R. 154] The lower court found that Appellee has reasonable grounds to believe that Appellants Clifford O. Boren and Delta M. Boren “may have filed false or fraudulent returns of income taxes for the years 1950 and 1951, with intent to evade the taxes or may have willfully attempted to defeat or evade the taxes imposed by the Internal Revenue Code.” [R. 61]

The only evidence introduced by Appellee on this issue is contained in his affidavits. In his first affidavit which is dated September 19, 1955, he asserts that “Preliminary investigation of the taxable years 1950 and 1951 of the Borens shows that in excess of \$40,000.00 of taxable income was not reported by the taxpayers as required by law.” [R. 12] In his second affidavit, dated November 30, 1955, he asserts that Appellant Corporation carried on its payroll and issued weekly payroll checks to an

“employee” who worked for Appellants not more than 10 or 12 days in 1951; that the payroll checks bore the endorsement of the “employee” followed by the endorsement of Appellant Delta M. Boren; and that the “employee” denied filing a tax return which was filed in her name, reporting that she had received salary in the amount of \$2,817.97 from Appellant Corporation. [R. 34]

Appellants respectfully submit that this evidence is not a definite factual showing that fraud is the issue in the renewed inquiry.

The statements contained in Appellee’s first affidavit are nothing but Appellee’s unsupported conclusions. There are no facts from which a Court could examine and conclude that Appellee had reasonable cause to believe that false and fraudulent returns were filed. Of course, Appellee should not be required to completely prove a fraud case in a proceeding such as this but he should be required to prove facts from which a Court could reasonably infer that the requisite elements of fraud were present.

It is the Court’s function to determine from the evidence introduced the amount and nature of the receipt claimed not to have been reported, whether such receipt was taxable income and whether the taxpayers were required by law to report such receipt. Furthermore, it is the Court’s function to determine from the evidence whether Appellee has reasonable cause to believe that false or fraudulent returns had been filed. On the issue of intent, the sole evidence is Appellee’s assertion that no evidence has been discovered tending to show that the omission “was not done with the purpose and intent to evade or defeat the

payment of the taxpayer's taxes." [R. 12] Appellee makes no mention of whether he made any efforts to discover such evidence.

The factual assertions in Appellee's second affidavit likewise do not amount to a definite factual showing of fraud.

If there was evidence that the employee had not received the money and evidence that either Clifford O. Boren or Delta M. Boren had received it, together with evidence that the money was received by either Clifford O. Boren or Delta M. Boren as beneficial owners, and was intentionally unreported by the recipient, a sufficient factual showing probably would have been made. Here, however, there is no evidence that the money was not received by the employee nor is there evidence that it was received by Clifford O. Boren or Delta M. Boren in any capacity.

Furthermore, this information was possessed by Appellee in March, 1955 and he examined the books and records with this information in mind until July 15, 1955. No additional information has been obtained by Appellee. No justification therefore exists for making a renewed inquiry.

VII

THE FAILURE TO COMPLY WITH AN ADMINISTRATIVE SUMMONS IS NOT CONTEMPTUOUS CONDUCT AND IN AN ACTION TO ENFORCE SUCH SUMMONS AN ORDER TO SHOW CAUSE WHY THE SUMMONED PERSON SHOULD NOT BE HELD IN CIVIL CONTEMPT FOR FAILURE TO OBEY SUCH SUMMONS FAILS TO STATE A CLAIM UPON WHICH PERSON COULD BE HELD IN CIVIL CONTEMPT.

Appellants moved the lower court to vacate the orders to show cause on the grounds (1) that Appellee's petition failed to state a claim upon which an attachment could issue as for a contempt, and (2) failed to state a claim upon which Appellants could be held in civil contempt. [R. 15] The lower court vacated those portions of the orders to show cause which required Appellants to show cause as for a contempt, but ordered that the remaining cause why an attachment should not issue against Appellants should remain in effect. [R. 66]

It is Appellants' contention here that the orders to show cause failed to state a claim upon which Appellants could be held in civil contempt.

Orders to show cause were issued upon the *ex parte* application of Appellee to Appellants Clifford O. Boren and Delta M. Boren. [R. 9, 10, 14]

Each of the orders required the Appellant to whom it was directed to appear before the United States District

Court "... to show cause, if any there be, why an attachment should not issue against [Appellant] as for a contempt..." Each of the orders also requires that the Appellants at said time show why they "... should not be held in civil contempt."

Where obedience to an administrative summons is declined, Section 7604(b) provides a procedure to bring the summoned person before the Court for a hearing of the case, for an order of the Court directing compliance with the administrative summons, and for the punishment of the summoned person if he defaults or disobeys the Court's order. Section 7604(a) of the Internal Revenue Code of 1954 confers jurisdiction upon the United States District Court "by appropriate process to compel such attendance, testimony, or production of books, papers, records, or other data."

Disobedience to administrative summons issued under authority of Section 7602 of the Internal Revenue Code of 1954 is not, *per se*, contempt. Contemptuous conduct arises only through disobedience of an order made by the Court directing that the summoned person appear and testify before the officers issuing the summons and produce the required records.

In *Isidore Wolrich, et al v. Naboshek, Gurian & Lindenbaum*, (1940) U.S.D.C. S.D.N.Y., 84 F. Supp. 481, the Court was called upon to consider the nature of the power conferred upon the Commissioner by Section 3614(a) of the Internal Revenue Code of 1939, now Section 7602 of the Internal Revenue Code of 1954. The Court there stated:

“Unlike the Collector of Internal Revenue, 26 U.S. C.A., Sec. 3615, the Commissioner has no power of subpoena in his own right. He can merely examine books and records and ‘require’ the attendance of persons having knowledge in the premises. If the party whose attendance is ‘required’ fails to attend, the Commissioner may ask the district court ‘by appropriate process to compel such attendance, testimony, or production of books, papers, or other data’. 26 U.S. C.A. Sec. 3633. A subpoena, subpoena *duces tecum*, or order to appear and produce is patently an appropriate process. If it is disregarded, then contempt proceedings may ensue. The Collector, however, does not need the aid of the Court to compel attendance or production. If a Collector’s summons is disregarded, contempt proceedings may ensue immediately. 26 USCA Sec. 3615.”

Accord: *In the Matter of Albert Lindley Lee Memorial Hospital*, (1953) D.C. N.D.N.Y. No official report but see 53-1 USTC, Par. 9266, Affirmed CCA2d (1953) 209 F. 2d 122.

Section 7602 of the Internal Revenue Code of 1954 consolidated Sections 3614, 3615(a), (b) and (c) and 3632(a)(1) of the Internal Revenue Code of 1939. The consolidation of these sections into Section 7602 resulted in no material change from the law previously existing. The only change was a technical change by the Senate striking out the words “or any other person having knowledge in the premises” and inserting “or any person having possession, custody, or care of books of account containing entries relating to the business of the person liable for tax or required to perform the act, or any other person the Sec-

retary or his delegate may deem proper.” *House of Representatives Committee Report No. 1357, Senate Report No. 1662, and Conference Report No. 2543, 1954 U.S. Code Cong. and Adm. News, p.p. 4584, 5268, 5280, respectively.*

The Federal Administrative Procedure Act expressly recognizes the right of parties subject to administrative subpoenas to contest their validity in the courts prior to subjection to any forms of penalty for non-compliance.

Section 1005(c), Title 5, U.S.C., provides in part: “Upon contest the Court shall sustain any such subpoena or similar process or demand to the extent that it is found to be in accordance with law, and, in any proceeding for enforcement, shall issue an order requiring the appearance of the witness or the production of the evidence or data within a reasonable time under penalty of punishment for contempt in case of contumacious failure to comply.”

Section 1005, Title 5, U.S.C., is applicable to the summonses issued by Appellee. *U.S. v. Aylmer V. Smith, et al*, (1949) D.C. Conn. 87 F. Supp. 293.

SUMMARY OF ARGUMENT AND CONCLUSION

The necessity for an examination by a revenue agent under summonses *duces tecum*, and the reasonableness of the scope of his examination, are proper matters to be inquired into in an action to enforce such summonses. Lack of necessity for the examination and unreasonableness of the scope of examination are proper defenses to the action. This is especially true where complete and detailed examinations have been previously made for the same purpose,

and where the examination is of a third party's books and records.

After one inspection of a taxpayer's books of account has been made, no re-examination can be made unless the Secretary of the Treasury, or his delegate, after investigation, require it and notify the taxpayer thereof in writing. Even where this is done, the Secretary or his delegate must be prepared to establish the necessity for the re-examination. If there is no necessity for the examination, there is an arbitrary abuse of power.

The authority given by the statute to a Revenue Agent is to "examine" the taxpayer's books and records. There cannot be read into this limited grant of power the authority to require a taxpayer's books and records to be photographically reproduced for the further use of the Revenue Agent. To do so would be to permit in effect a seizure of a taxpayer's books and records without providing the constitutional safeguards required for a seizure of a person's property.

The authority given to a revenue agent to "examine" is for the express purpose of ascertaining the correctness of an income tax return. This authority cannot be used for the admitted purpose of securing evidence for a criminal prosecution. To permit the use of administrative summonses for this purpose would sanction a perversion of the authority granted.

The authority to examine books and records is further limited to those which are material or relevant to the inquiry into the correctness of the return under investiga-

tion. The burden is upon the revenue agent in the first instance to prove that the books and records demanded are material or relevant to the tax liability of the person liable therefor, and that the books and records contain items relating to the business of the person liable for the tax.

This burden is not met by evidence casting doubt on the propriety of a payroll deduction by a third party taxpayer for a portion of one year; the assertion that the endorsement of one of the individual taxpayers appeared in the chain of endorsements on the payroll checks and after the employee's endorsement; and, the denial by the employee that she filed a return reporting such income, which return was in fact filed.

After the normal period of limitations for assessments of taxes has run, no examination can be made without a definite factual showing that fraud is the issue of the renewed inquiry. The revenue agent need not completely prove a fraud case but he should be required to prove facts from which the Court could reasonably infer that the requisite elements of fraud are present. Unsupported conclusions and isolated, unrelated facts do not constitute a definite factual showing that fraud is the issue of the *renewed* inquiry. Especially is this true when the revenue agent was possessed of the facts on which he premises the necessity for the renewed inquiry during the time he conducted the previous examinations.

The failure to comply with an administrative summons is not, *per se*, contemptuous conduct. Contemptuous con-

duct will arise only after the revenue agent has sought, and obtained, after a judicial hearing, an order directing compliance with the summons, and this order is not obeyed.

The Judgment and Order of the District Court should be reversed.

Respectfully submitted,

JOHN A. BRANT
Attorney for Appellants

APPENDIX

INTERNAL REVENUE CODE OF 1954

SEC. 7602. EXAMINATION OF BOOKS AND WITNESSES.

For the purpose of ascertaining the correctness of any return, making a return where none has been made, determining the liability of any person for any internal revenue ~~tax~~ or the liability at law or in equity of any transferee or fiduciary of any person in respect of any internal revenue tax, or collecting any such liability, the Secretary or his delegate is authorized —

(1) To examine any books, papers, records, or other data which may be relevant or material to such inquiry;

(2) To summon the person liable for tax or required to perform the act, or any officer or employee of such person, or any person having possession, custody, or care of books of account containing entries relating to the business of the person liable for tax or required to perform the act, or any other person the Secretary or his delegate may deem proper, to appear before the Secretary or his delegate at a time and place named in the summons and to produce such books, papers, records, or other data, and to give such testimony, under oath, as may be relevant or material to such inquiry; and

(3) To take such testimony of the person concerned, under oath, as may be relevant or material to such inquiry.

SEC. 7604. ENFORCEMENT OF SUMMONS.

(a) Jurisdiction of District Court.—If any person is summoned under the internal revenue laws to appear, to testify, or to produce books, papers, records, or other data, the United States district court for the district in which such person resides or is found shall have jurisdiction by appropriate process to compel such attendance, testimony, or production of books, papers, records, or other data.

(b) Enforcement.—Whenever any person summoned under section 7602 neglects or refuses to obey such summons, or to produce books, papers, records, or other data, or to give testimony, as required, the Secretary or his delegate may apply to the judge of the district court or to a United States commissioner for the district within which the person so summoned resides or is found for an attachment against him as for a contempt. It shall be the duty of the judge or commissioner to hear the application, and, if satisfactory proof is made, to issue an attachment, directed to some proper officer, for the arrest of such person, and upon his being brought before him to proceed to a hearing of the case; and upon such hearing the judge or the United States Commissioner shall have power to make such order as he shall deem proper, not inconsistent with the law for the punishment of contempts, to enforce obedience to the requirements of the summons and to punish such person for his default or disobedience.

SEC. 7605. TIME AND PLACE OF EXAMINATION.

* * *

(b) Restrictions on Examination of Taxpayer.—No taxpayer shall be subjected to unnecessary examination or

investigations, and only one inspection of a taxpayer's books of account shall be made for each taxable year unless the taxpayer requests otherwise or unless the Secretary or his delegate, after investigation, notifies the taxpayer in writing that an additional inspection is necessary.

SEC. 7607. CROSS REFERENCES.

* * *

(b) Search Warrants.—

For provisions relating to—

(1) Searches and seizures see Rule 41 of the Federal Rules of Criminal Procedure.

INTERNAL REVENUE CODE OF 1939

SEC. 275. PERIOD OF LIMITATION UPON ASSESSMENT AND COLLECTION.

Except as provided in section 276 —

(a) General Rule. — The amount of income taxes imposed by this chapter shall be assessed within three years after the return was filed, and no proceeding in court without assessment for the collection of such taxes shall be begun after the expiration of such period.

* * *

(c) Omission from Gross Income. — If the taxpayer omits from gross income an amount properly includible therein which is in excess of 25 per centum of the amount of gross income stated in the return, the tax may be assessed, or a proceeding in court for the collection of such

tax may be begun without assessment, at any time within 5 years after the return was filed.

SEC. 276. SAME — EXCEPTIONS.

(a) False Return or No Return. — In the case of a false or fraudulent return with intent to evade tax or of a failure to file a return the tax may be assessed or a proceeding in court for the collection of such tax may be begun without assessment, at any time.

SECTION 1005(c), TITLE 5, U.S.C.

(c) Subpoenas and production of evidence.

Agency subpoenas authorized by law shall be issued to any party upon request and, as may be required by rules of procedure, upon a statement or showing of general relevance and reasonable scope of the evidence sought. Upon contest the court shall sustain any such subpoena or similar process or demand to the extent that it is found to be in accordance with law and, in any proceeding for enforcement, shall issue an order requiring the appearance of the witness or the production of the evidence or data within a reasonable time under penalty of punishment for contempt in case of contumacious failure to comply.



No. 15010.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

CLIFFORD O. BOREN, DELTA M. BOREN and CLIFFORD O.
BOREN CONTRACTING CO., INC.,

Appellants,

vs.

LLOYD M. TUCKER, Special Agent, Internal Revenue
Service,

Appellee.

On Appeal From the Judgment of the United States District
Court for the Southern District of California.

BRIEF FOR THE APPELLEE.

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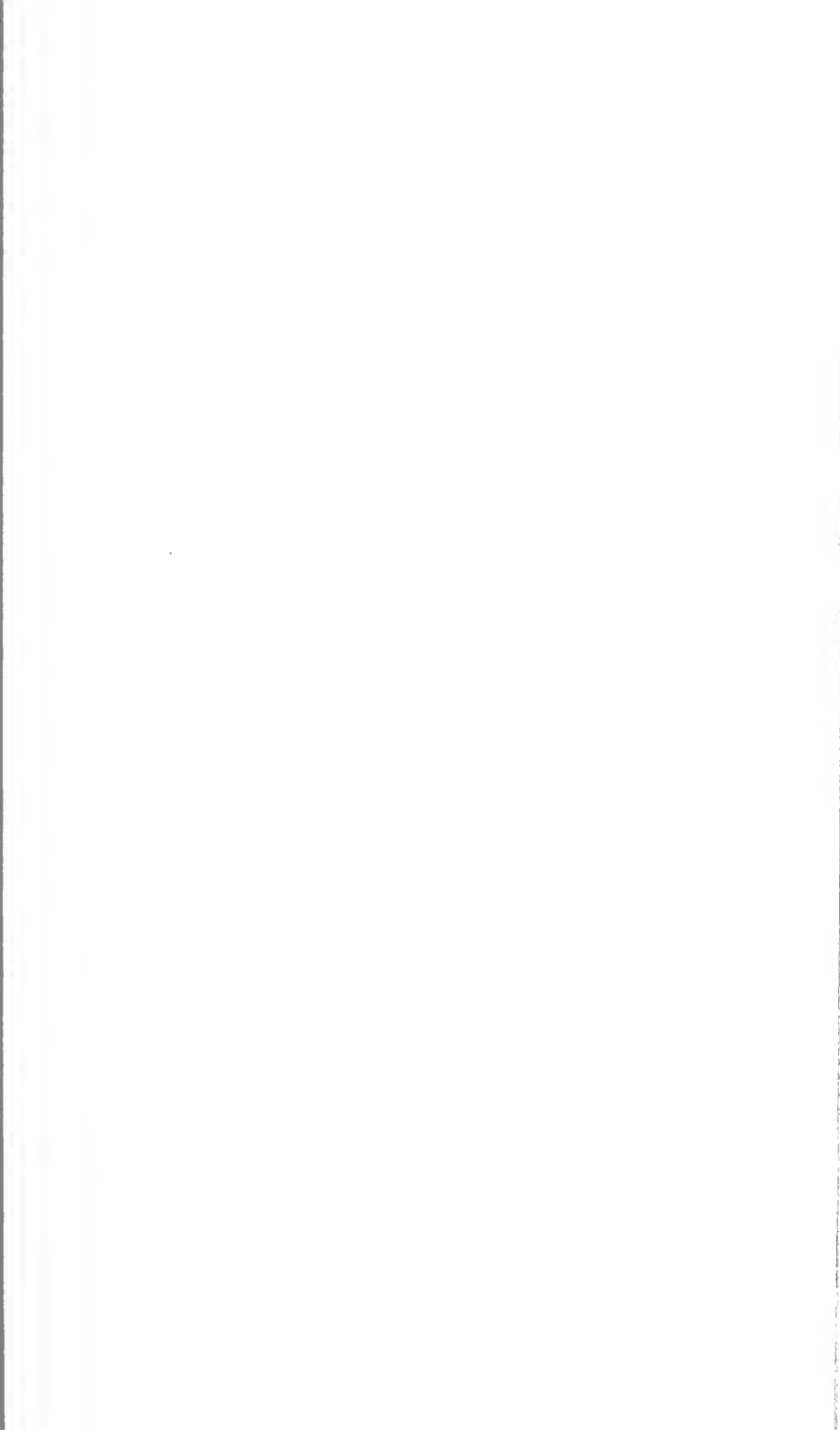
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No. 15010.

IN THE

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FOR THE NINTH CIRCUIT

CLIFFORD O. BOREN, DELTA M. BOREN and CLIFFORD O.
BOREN CONTRACTING CO., INC.,

Appellants,

vs.

LLOYD M. TUCKER, Special Agent, Internal Revenue
Service,

Appellee.

On Appeal From the Judgment of the United States District
Court for the Southern District of California.

BRIEF FOR THE APPELLEE.

Opinion Below.

The District Court filed no formal opinion.

Jurisdiction.

This is an appeal from a judgment holding that appellants were in civil contempt of the District Court for not complying with the order of Court enforcing three summonses issued under the authority of Section 7602 of the Internal Revenue Code of 1954, 68A Statute 901, by a special agent of the Internal Revenue Service requiring the production of certain records in connection with the investigation of two taxpayers. [R. 76-79.] Jurisdiction was conferred on the District Court by Sections 7402, 7602, 7603, 7604, 7605 of the Internal Revenue

Code of 1954, 68A Statute 873, 901, *et seq.*, and 28 U. S. C., Secs. 1340, 1345.

The Judgment of Civil Contempt and Order Committing the Respondents, Delta M. Boren and Clifford O. Boren to Custody (and fining the respondent Clifford O. Boren Contracting Co., Inc.) was filed on December 13, 1955, and docketed and entered on December 15, 1955. [R. 79.] A notice of appeal dated December 13, 1955, was filed on December 16, 1955. [R. 81.] Although the notice of appeal states appeal is taken from a final judgment entered on December 13, 1955, it is obvious that the notice can only refer to the final judgment of civil contempt filed that date but not entered until December 15, 1955. [R. 79-81, 197-199.] Jurisdiction is conferred on this Court by 28 U. S. C. Sec. 1291.

Questions Presented.

I. Whether the District Court after a full hearing, properly held appellant corporation and its responsible officers in civil contempt for wilfully refusing to obey its order compelling them to produce for examination, copying, and photographing or photostating by the Internal Revenue Service, certain payroll checks and other records of the corporation which the District Court found to be material to, relevant to, and within the scope of a continuing inquiry into the tax liability of persons other than the corporation.

II. Whether a third person, a corporation, not the taxpayer under investigation, can be compelled to produce certain of its books, records, and payroll checks for

examination, copying, photographing or photostating, under the administrative summons procedures of the internal revenue laws.

III. Whether the Internal Revenue Service may proceed with an administrative investigation into a taxpayer's liability by using its subpoena powers over a third person, if the documents summoned might bring to light information eventually leading to a criminal prosecution of the taxpayer for tax evasion as well as to additional assessments against him for deficiencies in taxes and civil fraud penalties.

Statutes Involved.

The pertinent statutes are printed in the Appendix, *infra*.

Statement.

An examination into the income tax liability of Delta M. Boren and Clifford O. Boren for the calendar years 1950 and 1951 was commenced on November 2, 1953 by Internal Revenue Agent Charles D. Ford. [R. 50, 118.] Agent Ford requested that a special agent from the Intelligence Division be assigned to cooperate in the investigation on April 28, 1954. [R. 108.] Special Agent Lloyd Tucker was assigned to cooperate in the investigation on May 11, 1954, but didn't then commence investigating. [R. 11, 51, 108.] Ford resigned from the Internal Revenue Service on September 10, 1954. [R. 109, 113.] On October 6, 1954, Delta M. Boren reported to the Internal Revenue Service irregularities

on the part of Charles D. Ford after he left the service. *^[R. 108.] On the same date, Internal Revenue Agent Forrest P. Calkins was assigned to the case to resume the investigation of the tax liability of Delta M. Boren and Clifford O. Boren for the years 1950 and 1951. ^[R. 108.]

Agent Calkins proceeded to San Diego on October 18, 1954, and on October 20, 1954, with Special Agent Tucker commenced examining the liability of Delta and Clifford Boren for 1950 and 1951, starting from "scratch." ^[R. 109.]

On October 20, 1954, Special Agent Tucker stated to John Brant, attorney for the Borens and the Clifford O. Boren Contracting Co., Inc., hereinafter for convenience referred to as the Boren Company, that he wished to examine the proprietorship books and records maintained by Clifford O. Boren and Delta M. Boren for the years 1950 and 1951. ^[R. 11.] Mr. Brant advised that neither Special Agent Tucker nor Internal Revenue Agent Calkins could examine said records or hold any conversations with Mr. or Mrs. Boren. ^[R. 11-12.] On December 7, 1954, Special Agent Tucker for the first time asked permission to examine the records of the Boren Company in connection with the tax investigation of Clifford O. Boren and Delta M. Boren. ^[R. 12.] Permission to examine the corporate books and records

*On April 25, 1956, subsequent to the docketing of this appeal, in *United States v. Del L. Brandow, Charles D. Ford, et al.*, So. Dist. of Calif., case No. 24955-CD, the Grand Jury returned an indictment against Charles D. Ford and others for conspiring to defraud the United States by endeavoring to sell information gained while a Government agent through the solicitation (made to Delta M. Boren) of employment for himself and others. Ford pleaded not guilty to the charge and the case is presently set for trial September 11, 1956.

was at first denied, but on December 15, 1954, Agents Tucker and Calkins commenced the examination of the records of the corporation. [R. 12.] During the course of the examination of the corporate records, on scattered intervals from December 15, 1954 to July 15, 1955, the Agents examined, among other things, the payroll checks of the Boren Company. [R. 13, 42, 51-52, 57.]

Preliminary investigation of the taxable years 1950 and 1951, of the Borens indicated to the agents that a sum in excess of \$40,000 of taxable income was not reported by the taxpayers though required by law. [R. 12, 50.] Agent Tucker was able to discover no evidence tending to show that this nondisclosure was due to mistake, inadvertence, or other justifiable legal reason, or tending to show that it was not done with the purpose and intent to evade and defeat the payment of the taxpayers' incomes. [R. 12, 51.] The statute of limitations extended by waiver barred any assessment of civil tax liability (other than fraud) for the year 1950 after June 30, 1955. [R. 55.] The statute of limitations on assessment of deficiencies (other than fraud) against the taxpayers for the year 1951 would have run on March 15, 1955. [R. 56.] Accordingly, because the taxpayers would not consent to further extensions of the statute of limitations, on March 11, 1955, the Commissioner issued notices of deficiency to the taxpayers for the years 1950 and 1951. [R. 55, 56, 131.]

Shortly after the issuance of notices of deficiency and on or about March 15, 1955, Special Agent Tucker was first informed that one of the persons carried as a salaried employee on the payroll of the Boren Company during the second half of 1951 was not a bona fide employee for much of that time, that certain payroll checks of the

Boren Company with respect to said employee were issued in excess of the actual compensation received by the employee and that the purported endorsements of the employee on the checks were forged. [R. 33-34, 52-53, 132.] Said employee was shown as a full-time employee for the latter half of 1951 on the corporate books and records but denied under oath that she worked more than ten or twelve days during said year. [R. 34.] All of said payroll checks also bore the endorsements of Delta M. Boren. [R. 34, 52.]

Special Agent Tucker had reasonable cause to believe that Delta M. Boren and Clifford O. Boren, or either of them, may have actually received and failed to report income which the books of the Boren Company showed to have been paid to an employee, all with the intent willfully to evade and defeat the payment of income taxes. [R. 53, 59, 61.]

Thereafter, Agent Tucker attempted to get permission from the Boren Company to make photographic or photostatic copies of the checks, endorsements included, in order to determine, with the aid of handwriting experts, the true maker of the endorsements. [R. 34, 35, 53, 58.] The Clifford O. Boren Contracting Co., Inc., its president, Clifford O. Boren, and its vice-president, Delta M. Boren, and its attorney, John Brant refused to make the checks available for this purpose. [R. 35, 130, 131.]

On August 25, 1955, summonses were issued by Special Agent Tucker to the Clifford O. Boren Contracting Co., Inc., to Clifford O. Boren as president thereof, and to Delta M. Boren as vice-president thereof, to appear before Agent Tucker in San Diego on September 6, 1955, in connection with the tax liability of Delta and Clifford Boren for the years 1950 and 1951 and to produce the

following records of the Clifford O. Boren Contracting Co., Inc.: General Journal, Cash Journal, General Ledger, Payroll Records and Payroll Checks, bearing the endorsements of any of the following named persons—Clifford O. Boren, Delta M. Boren, Marjorie H. Bell, Betty K. McCarthy, and the Clifford O. Boren Contracting Co., Inc., for the period from July 1, 1951 to December 31, 1951. [Petitioner's Ex. 1, pp. 6-8.]

At the time and place set for hearing, Delta M. Boren and Clifford O. Boren, president and vice-president respectively of the corporation, appeared with John A. Brant, their attorney and attorney for the Boren Company, but refused to produce the books, records, checks and other data summoned. [R. 54-55.] A petition to enforce the summonses was filed by Special Agent Lloyd Tucker in the District Court on September 19, 1955. [R. 8.] The petition was presented to Judge Harry C. Westover on September 19, 1955. [R. 9-10, 98.] Judge Westover chose to issue orders to show cause directed to the officers of the Boren Company rather than writs of attachment. [R. 98.] The orders to show cause were returnable before the District Court and pursuant thereto a hearing was held in the Southern Division before the Hon. Wm. C. Mathes, United States District Judge, on December 5, 1955. [R. 84-176.] At the conclusion of the hearing, at which testimony was taken, witnesses cross-examined, and evidence introduced, the Court made its findings of facts, conclusions of law and order with respect to the pleadings. [R. 48-63.] The order directed the Borens as officers of the Boren Company to appear before Special Agent Tucker on December 8, 1955, and to produce for examination, copying, and photostating the records called for in the summonses, and in the event of their failure so to do, to re-appear before the Court on

December 13, 1955, and show cause why they should not be held in civil contempt of the Court. [R. 63.]

Pursuant thereto, Clifford O. Boren and Delta M. Boren, representing the corporation, and the attorney, representing them and the corporation, appeared before Special Agent Tucker on December 8, 1955. [Ex. 1; R. 207-218.] The witnesses refused to produce the summoned books, records, and papers for examination, copying, and photostating, giving as reasons therefor, only the reasons stated in their answer to the petition filed in the action. [R. 208, 212-214.]

Thereafter, the Borens with their counsel returned before the Court in the morning of December 13, 1955, without the records and were ordered by the Court to return that same afternoon with the summoned records. [R. 189-190, 74-75.]

The witnesses, Delta M. Boren, vice-president of Clifford O. Boren Contracting Co., Inc., and Clifford O. Boren, president of said corporation, re-appeared before the Court that afternoon. They stated to the Court that they had with them the summoned books and records including the payroll checks. The Court then ordered them to deliver the 1951 records into the custody of the Clerk for examination, copying and photographing or photostating by Special Agent Tucker. [R. 192.] The Borens refused, giving as their only reason, "those set forth in the answer to the petition filed in this court." [R. 193.] The Court then made its judgment committing Clifford O. Boren and Delta M. Boren to the custody of the Marshal of the Court to be imprisoned in a jailtype institution until the affirmative order of the Court is obeyed. [R. 193, 76-79.] The Court also fined the corporation a compensatory fine of \$110.00. [R. 78.]

Summary of Argument.

A special agent of the Internal Revenue Service here seeks to aid the investigation of the tax liability of Clifford O. and Delta M. Boren by the examination and photostating of certain specified records and documents belonging to a third party corporation. The corporation is controlled by Clifford O. Boren, president, and Delta M. Boren, vice-president, the taxpayers and subjects of the investigation. The corporation, through its officers, Clifford O. and Delta M. Boren, resists such examination on the grounds that the records have already been examined once by the Internal Revenue Service; that a further examination is unnecessary; that the examination permitted the Internal Revenue Service by Section 7602, Internal Revenue Code of 1954, does not encompass the photostating or photographing of the corporation's records; and that the examination contemplated under Section 7602 is not permitted where one of the admitted purposes is to secure evidence to be used in a later criminal prosecution.

The facts before the lower court show, and the court found that Special Agent Tucker's examination of the tax liability of Clifford O. and Delta M. Boren never terminated and is still continuing. That being so, there is no "re-examination" of the Boren's tax liability within the meaning of Section 7605(b) of the Internal Revenue Code.

The evidence introduced at the hearing supports the finding that the making of photostatic reproductions of payroll checks of appellants was necessary to the investigation, in that Special Agent Tucker found evidence that payroll checks of the corporation were being issued, endorsements being forged, checks cashed, and the proceeds

going not to the payee but to the taxpayers, subjects of the investigation. The evidence shows there was reasonable cause for the agents to suspect and investigate for fraud. The statute of limitations provides no limitation period as to tax deficiencies due to fraud.

The refusals of appellants to produce specified records and documents for examination and photostating were clearly contemptuous acts committed in the presence of the court, and the court's judgment committing Clifford O. and Delta M. Boren and fining the corporation was proper.

The order of the court requiring appellants to produce certain records for photographing does not exceed the statutory authority given by Section 7602, Internal Revenue Code of 1954, in that it is only reasonable to interpret the authority to examine complicated books of account to include the right to copy or photograph the same.

The fact that evidence uncovered by a Treasury agent in response to a summons may later be used in a criminal proceeding, does not restrict the agent's authority to examine witnesses and summon documents and persons under Section 7602, Internal Revenue Code of 1954.

ARGUMENT.

I.

The District Court Properly Held the Appellants, a Corporation and Its Responsible Officers, in Civil Contempt for Wilfully Failing and Refusing to Obey the Court's Order Compelling Appellants to Produce for Examination and Copying by Photographic Means Corporate Documents and Checks Summoned by a Special Agent of the Internal Revenue Service in Connection With His Investigation of the Income Tax Liability of Two Individuals, the Officers.

A. The Examination Into the Income Tax Liability of Delta M. Boren and Clifford O. Boren for the Years 1950 and 1951, Which Commenced November 2, 1953, Never Terminated and Is Still Continuing.

The investigation of the tax liability of Delta M. Boren and Clifford O. Boren for 1950 and 1951 started as a civil investigation. During its course, Ford, the internal revenue agent first assigned to the case, asked that a special agent (who has cognizance of civil and criminal fraud) also be assigned to the case. A special agent, the appellee Tucker, was assigned, but did not actually get involved in the investigation until after the original revenue agent had resigned, been accused of misconduct by one of the appellants, and a new internal revenue agent assigned to take over the investigation. In the circumstances of Delta Boren's accusation, the new internal revenue agent, Calkins, started from "scratch."

The two agents, working under threatening bars of limitations on civil assessments for 1950 and 1951, of three and six months at most (March 15, 1955, and June 30, 1955) proposed substantial deficiencies against Delta

and Clifford Boren for both years. Int. Rev. Code of 1954, Sec. 6501(a). The Commissioner of Internal Revenue accordingly issued on March 11, 1956, notices of deficiency for taxes and fraud penalties within the three year period of limitations as extended by waiver.

Just after that, about March 15, 1955, Special Agent Tucker first learned of additional probable fraudulent evasion of income taxes by Delta and Clifford Boren for 1951 achieved by falsifying Boren Company payroll checks and forging an employee's endorsements. In order to determine the verity of the information and to determine whether then to impose additional civil fraud sanctions or to recommend criminal prosecution, he sought to obtain photographic or photostatic copies of the payroll checks. The Boren Company and its officers, Delta and Clifford Boren resisted. This proceeding ensued, culminating in the final order in civil contempt committing to custody Delta and Clifford Boren until they comply, and fining the corporation, from which they all appeal. Execution of the judgment has been stayed pending appeal.

At no time did the investigation terminate or conclude. At the time Agent Ford resigned, Tucker, another type of Treasury agent, a Special Agent, having cognizance of fraud, had already been assigned to cooperate, but had not yet begun his phase of the investigation. After Ford's resignation and upon complaint to the Internal Revenue Service by Delta Boren about irregularities by Ford, another Internal Revenue Agent, Calkins, was assigned to the case, who, because of the taxpayer's accusations, did his own work from "scratch." This was not a "re-examination," but a continuance of an existing examination, albeit a fresh start, in view of the taxpayer's accusations. By refusing to rely on the pre-

liminary work of the "suspect" former agent, Ford, the Government leaned over backwards not to prejudice the taxpayers.

There had been no determination, one way or another, of deficiency or no deficiency prior to Calkins' assignment to the case. Certainly Tucker could not have completed his examination as he hadn't even started.

On March 11, 1955, notices of deficiency were sent out because of the imminent running of the statute of limitations. But the cases were not closed. On the contrary, Special Agent Tucker had almost simultaneously learned of facts indicating more fraud. As long as fraud was involved, the Government was not precluded from assessing additional deficiencies based thereon and no statute of limitations barred assessment. Int. Rev. Code of 1954, Sec. 6501(c)(2). In addition, criminal prosecution was and is a possibility, as with respect thereto a six year statute is operative. Int. Rev. Code of 1939, Sec. 3748(a).

In August, 1955, the summonses, subject of this proceeding, were issued in this continuing investigation. Therefore, the evidence clearly supports the finding [XXIII, R. 58] that:

"The Tax investigation of the Borens commenced in November, 1953 and continued without interruption or termination since that date, and is still continuing."

There has been no "re-examination" of the Borens' tax liability within the meaning of Internal Revenue Code, Section 7605(b), and the conditions precedent thereto therein contained are inapplicable to this investigation of the books and records of a person other than the taxpayer.

B. The Evidence Supports the Findings That the Making of Photographic Reproductions of Payroll Checks of Appellant Corporation Is Material, Relevant and Necessary to Special Agent Tucker's Investigation.

Special Agent Tucker had specific information that payroll records of the appellant Boren Company were falsified and had reason to believe proceeds of the falsification had been diverted to Clifford or Delta Boren and not reported by them in their income tax returns.

Delta and Clifford Boren are the owners and officers in control of the Boren Company, and if false payroll checks were issued and cashed by their forging the endorsements, and if the proceeds were received by them, such proceeds could be taxable income. *Kann v. Commissioner*, 210 F. 2d 347 (3rd Cir., 1953).

To determine whether or not such income was received by the plaintiffs, a determination as to who actually endorsed the payroll checks is important.

Where a bank objected to an agent's summons on the grounds that its entries were immaterial and inadmissible as to the taxpayers, the court held that evidence of moneys passing through a person's hands while not always income, is evidence from which income can be inferred, and does tend to show income. *United States v. First National Bank of Mobile*, 295 Fed. 142 (S. D. Ala., 1924), *aff'd per curiam*, 267 U. S. 576 (1925).

A further, incidental, and nonetheless important result might be the determining the existence of an element of wilfulness in connection with *both* civil and criminal fraud.

The cases generally say the agent must merely indicate he has reason to believe there are grounds for fraud

when an investigation extends beyond the years open to a civil investigation. Tucker did far more; he laid all his cards on the table. He had reason to believe there was fraud and has candidly stated his reasons. The Court properly found them sufficient and that fraud is the issue of the inquiry. [Findings of Fact VI, VII, X, XXII, XXV; Conclusions of Law IV, V; R. 50 *et seq.*]

C. The Order Appealed From Is the Court's Own, for a Contempt Committed in the Presence of the Court.

Where there is a fraud investigation, as here, and the statute of limitations otherwise would have barred an assessment, as here, and the agent's summons relates to evidence of persons other than those under investigation, as here, the investigation will be sustained if the agent has information indicating possible fraud. *Peoples Deposit Bank & Trust Co. v. United States*, 212 F. 2d 86 (6th Cir., 1954), *cert. denied*, 348 U. S. 838; *Schulman v. Dunlap*, 105 Fed. Supp. 104 (S. D. N. Y., 1952).

Though under the rule of the above cases Tucker would only have been required to have stated he had suspicion of fraud and the District Court was not obliged to require proof of facts showing that the tax returns of the Borens were false and fraudulent, here he went much further and freely offered evidence of the facts showing his reasonable grounds. Here the evidence proffered satisfied the Court that the agent had reasonable grounds to suspect fraud, and is thus, on this ground alone, distinguished from the case of *Martin v. Chandis Securities Co.*, 34 Fed. Supp. 478 (S. D. Cal., 1940), *affirmed*, 128 F. 2d 731 (9th Cir., 1942).

In the *Martin* case, the Court of Appeals affirmed the District Court's refusal to enforce a summons where neither the petition nor the affidavits showed any reasonable ground of fraud to reopen a case ten years after the taxable year in question. Here the Court found the agent had reasonable grounds to suspect fraud and to continue his investigation despite the running of statute of limitations during the investigation's progress. The findings of the trial court must be sustained unless clearly erroneous. Here, they are supported by substantial evidence. Moreover, here they are not even subject to attack because the appellants are in default of Rule 18(d) of this Court. They have not in their brief made any specification of errors. It follows that they have not complied with the provisions requiring errors in findings of fact and conclusions of law be stated with particularity. The pertinent portions of the rule are as follows:

"18(d) In all cases a specification of errors relied upon which shall be numbered and shall set out separately and particularly each error intended to be urged. * * * In all cases, when findings are specified as error, the specification shall state as particularly as may be wherein the findings of fact and conclusions of law are alleged to be erroneous. * * *" Cf., *Kobey v. United States* 208 F. 2d 583 (9th Cir., 1953); *Mosca v. United States*, 174 F. 2d 448, 451 (9th Cir., 1949).

Tucker, the complaining agent, at a full formal hearing proved to the satisfaction of the court that the examination, copying, photographing or photostating of the

Boren Company's payroll checks was necessary, reasonable and within the scope of the investigation.

Cf. Local 174, International Brotherhood of Teamsters v. United States, F. 2d (9th Cir., 1955); 1956 C. C. H. Standard Federal Tax Reporter, Vol. 5, par. 9136; 1956 P. H. Federal Taxes, Vol. 4, par. 72,362.

Here the District Court complied fully with the criteria later set forth by this Court in its decision in the *Teamsters* case. The District Court, after full and extensive hearing, determined the propriety of the summons and exercised "its independent judgment as to what documents of entries were relevant."

The District Court, under the authority of Section 7402(b) of the Code, acted by "appropriate process" (orders to show cause, and later, direct orders) to "compel such attendance, testimony, or production of books, papers, or other data."

The refusals of the Borens, officers of the Boren Company, to obey the orders of Judge Mathes of December 13, 1956, to produce for examination, copying and photostating or photographing the summoned books and records, were clearly contemptuous acts, committed in the presence of the Court. [R. 74, 192-196.] The judgment committing Delta and Clifford Boren and fining the Boren Company was proper and should be affirmed. *Cf. Donnelly v. United States*, 201 F. 2d 826 (9th Cir., 1953).

D. The Appellants Have Never Stated Any Legally Sufficient Reason for Their Refusal to Produce the Books, Records, and Checks Summoned.

After a full and complete trial on December 5, 1955, on the petition of Special Agent Tucker and the answer of the appellants, the District Court filed on December 7, 1955, its findings of fact and conclusions of law and order compelling the officers of the Boren Company to comply with the Internal Revenue Service summonses. At the hearing before Special Agent Tucker on December 8, 1955, pursuant to said order, the appellants in refusing to obey said order of Court stated as their only grounds therefor that they relied on those grounds set forth in their answer to the petition filed in the action on November 10, 1955. The same responses were made to Judge Mathes on their return before him on December 13, 1955. He deemed the reasons insufficient for their refusal then to comply with his order and adjudged them in contempt. The Court had heard all the testimony and evidence, found that the investigation was necessary and proper, that the documents and checks summoned were necessary and that the agent was entitled to have them photographically copied.

The so-called defenses raised by the witnesses in their petition and later solely relied upon as grounds for their refusals to obey, were, first, a denial of the allegations of the petition. That was disposed of by the Court after its hearing in the Findings. [R. 49-55.]

The "second" alleged defense was that one inspection of the books of account of the Boren Company had

been made in connection with the tax liability of Clifford O. Boren and Delta M. Boren for 1950 and 1951. [R. 19.] The Court struck that defense finding it insufficient as a matter of law. [R. 75-76.] There is no provision of law barring more than one inspection of a witnesses' books in connection with a continuing investigation of another person's tax liability.

The "third" defense alleged apparently was that the tax liability of the Borens' for the years in question had been determined. [R. 24-26.] The Court on December 7, 1955, properly found to the contrary. [Finding XVIII, R. 56.]

The "fourth" defense was labeled "Failure to Utilize prior opportunity." [R. 26.] No such doctrine exists at law but nevertheless the Court found as a matter of fact that the special agent was at all times denied permission to photostat or photograph the payroll checks, exact copies of which were necessary to the continuance of the examination. [Findings XIX, XX, R. 56-57.]

As a "fifth" defense, the appellants urged that the examination seeks information for criminal prosecution and not ascertainment of tax liability. [R. 26.] Another section of this brief, Part III, points out the insufficiency of this defense as a matter of law. Moreover, as a matter of fact, the Court found that the purpose of Tucker's examination was both to determine the correctness of the tax returns filed by the Borens with respect to the possible assertion of additional assessments by reason of fraud and fraud penalty assessments, and to

determine possible criminal tax liability of the Borens. [Finding XXII, R. 58.]

For the "sixth" defense, the appellants alleged a requirement of a notice of additional inspection. [R. 27.] This apparently is premised on Section 7605(b) of the Internal Revenue Code which provides "only one inspection of a taxpayer's books of account shall be made for each taxable year unless the taxpayer requests otherwise or unless the Secretary or his delegate, after investigation, notifies the taxpayer in writing that an additional inspection is necessary." However, the Court found that the investigation of the Borens was one continuing investigation. Moreover, said section refers to "taxpayer's" books of account. The defense is attempted to be asserted here in behalf of the third person, the corporation and the corporate books, records, papers, and checks. The statutory condition is not pertinent to the corporation, a third person witness. The Court properly concluded this was a reasonable and necessary investigation.

As a "seventh" defense, the appellants alleged that the Commissioner had made a determination of the tax liability of Delta Boren and Clifford Boren and, therefore, it was no longer necessary to conduct an examination to ascertain the correctness of their returns. [R. 28-29.] The Court considered that defense and as a result of its hearing on December 5, 1955, determined that Special Agent Tucker had reasonable grounds to believe that the returns filed were not correct and the taxpayers "have additional liabilities with respect to civil fraud and may be liable under the criminal laws of the United States for filing false or fraudulent returns." [Finding XXV, R. 59.]

Likewise, for their “eighth” defense, the appellants claimed that the records were not material. [R. 29.] The Court found, Finding XXVI [R. 59-60], that the records were material and relevant. In any event, as a matter of law, the third person, the corporation, cannot object to the scope of an examination.

The “ninth” defense which alleged lack of probable cause for the issuance of the summonses was struck by the Court as not being a requirement contained in Internal Revenue Code. [R. 29-30, 75-76.] In addition, as a matter of fact, the petition was verified [R. 8] and the probable cause was certainly demonstrated to the Court during the course of the proceedings for the production of the documents.

The Court further found, Finding XXVII [R. 60], that the appellants failed to sustain any of their separate defenses.

To summarize, the appellants are here branded with contumacious conduct for failing and refusing to obey the orders of the Court to produce for examination, copying, photographing or photostating the checks, and in giving as their only grounds for such conduct the same grounds theretofore considered at length by the Court and by it deemed insufficient after full and complete hearing. No claims of privilege were here invoked, or could be invoked. The District Court, in view of its powers under Section 7402(a) and (b) of the Internal Revenue Code, properly dealt with the obdurate refusal and stubbornness of appellants.

II.

The District Court Properly Ordered Appellants to Produce Certain Records for Photographing by the Appellee.

Section 7602, Title 26, U. S. C. (1954, Int. Rev. Code) provides that,

“the Secretary or his delegate is authorized—

(1) To *examine* any books, papers, records or other data which may be relevant or material to such inquiry;

(2) To summon . . . any person having possession . . . of books of account containing entries relating to the business of the person liable for tax or required to perform the act, or any other person the Secretary or his delegate may deem proper, to appear before the Secretary or his delegate at a time and place named in the summons and to *produce* such books, papers, records, or other data, and to give such testimony, under oath, as may be relevant or material to such inquiry.” (Emphasis supplied.)

While this section does not specifically state and enumerate in exact detail what means may be employed by the Secretary or his delegate to make use of the books, records and papers which may be summoned under the statute, it certainly contemplates that the books, records and papers may be inspected and a reasonable means used to record or preserve the pertinent parts inspected.

The District Court found, as a conclusion of law, that the appellee, Special Agent Lloyd M. Tucker, had reasonable cause to believe that certain checks of the appellant,

Boren Company were falsified or forged and that the proceeds were received by the taxpayers, Delta M. and Clifford O. Boren, whose income tax returns were being investigated by Agent Tucker. [R. 61.] The Court's conclusion was supported by evidence consisting of the affidavit of Special Agent Tucker, which was received in evidence in lieu of his testimony on direct examination, but subject to cross-examination. In his affidavit Special Agent Tucker testified to facts ascertained during the investigation which caused him to believe that certain payroll checks had been falsified or forged, and that it was necessary for him to photograph or photostat these checks in order to have an expert analyze the handwriting thereon. [R. 34-35.]

The authority to summon books and documents, given by Congress to the Secretary or his delegate, would be hollow and meaningless if the agents were not allowed to record for their use the information appearing on the books and documents. A diligent search has revealed no cases specifically on this point of recordation in regard to the authority of the Secretary or Commissioner of Internal Revenue to examine and require the production of documents under the Internal Revenue Code. There is, however, a case decided by this court affirming an order of a District Judge requiring production of records for photographing in connection with an Office of Price Stabilization investigation. *Westside Ford v. United States*, 206 F. 2d 627 (9th Cir., 1953). The statute

under which a summons was issued by the OPS, 50 U. S. C. A., Appendix 2155(a), is similar to Section 7602, Title 26, U. S. C. The interpretation of this statute was commented on by this court at page 634 of 206 F. 2d 627, as follows:

“We are not impressed with the argument. The construction urged by appellant would mean that investigators may look at documents but may not record what they see; that they must commit to memory hundreds of documents, with long columns of figures, to determine complex questions whether the regulations have been violated or evaded. This *reductio ad absurdum* is a sufficient answer to appellant’s argument. Rightly construed Section 2155(a) gives the President or his appointees discretion as to the *means* of investigation as well as the subjects of investigation.”

Appellant in his brief (Br. 25) cites the case of *United States v. Kraus*, 270 Fed. 578 (S. D. N. Y., 1921), as his only authority for the proposition that his records could not be photographically reproduced by the Secretary or his delegate under Section 7602, Internal Revenue Code of 1954. The *Kraus* case is, however, not in point in that it is a case involving the question of illegal search and seizure. In the *Kraus* case Judge Learned Hand suppressed evidence which was illegally seized without a search warrant by prohibition agents, and in the same case refused to suppress evidence seized incident to an arrest. The present case does not in any way involve an illegal search and seizure in violation of the Fourth Amendment, but involves the production by legal process of the records of a third party.

III.

The Fact That Evidence Uncovered by a Treasury Agent in a Tax Investigation May Later Be Brought Out in the Criminal Case Does Not Negate or Restrict the Agent's Authority as a Delegate of the Secretary to Examine and Summon Documents and Persons Under Section 7602, Internal Revenue Code of 1954.

Section 7602 authorizes the Secretary or his delegate to examine books and other data "for the purpose of ascertaining the correctness of any return . . . determining the liability of any person for any internal revenue tax . . . or collecting such liability. . . ." Special Agent Tucker and Revenue Agent Calkins investigated the tax liability of Clifford O. and Delta M. Boren. [R. 11, 33.] As duly authorized agents of the Treasury Department, they were authorized to conduct such investigation by Sections 7601 to 7606, inclusive, Internal Revenue Code of 1954. In the course of the investigation of a taxpayer, Treasury agents are required to investigate and report any evidence of fraud with intent to evade taxes. Fraud has a definite bearing on tax liability in that a fifty per cent addition to the tax is applied by Section 6653, Internal Revenue Code of 1954, and with respect thereto there is no statute of limitations as to assessment and collection (Sec. 6501, Int. Rev. Code of 1954).

Special Agent Tucker has stated that he was primarily concerned with the investigation of alleged evasion of tax. [R. 11]. Tucker further testified that his examination was being conducted for the purpose of investigating possible criminal prosecution. [R. 117.] Special Agent Tucker also stated that his investigation was not yet

complete [R. 13], and therefore he has not completed his report or made any recommendation to his superiors, which recommendation could possibly be that the fifty per cent addition under Section 6653 be imposed and that criminal prosecution be not recommended to the Department of Justice. Special Agent Tucker is not an arm of the grand jury, or an arm of the Department of Justice, which is charged with the prosecution of Federal criminal cases.

Appellant has cited (Br. 27) the case of *United States v. O'Connor*, 118 Fed. Supp. 248 (D. C. Mass., 1953), for the proposition that the authority to require production of books and papers under Section 7602, Internal Revenue Code of 1954, cannot be used for the purpose of securing evidence for criminal prosecution. The facts in the *O'Connor* case show that the Treasury agents had completed their investigation and submitted their report to their superiors, which report in due course was referred to the Department of Justice and an indictment thereafter was returned by a grand jury. The special agent frankly admitted that the purpose of the *O'Connor* summons was to secure information for the criminal trial. *O'Connor* was clearly a case of the agent attempting to use a Commissioner's summons to obtain evidence in aid of a pending criminal prosecution in a case under indictment, and not for the purpose of determining tax liability. As the Court correctly pointed out, the grand jury could easily have compelled the production of the records in advance of trial. In the present case, the agents are still investigating and there is no indictment or pending criminal trial. The Fifth Circuit, in *Falsone v. United States*, 205 F. 2d 734 (5th Cir., 1953), *cert. denied*, 346 U. S. 864, discusses the Commissioner's

summons and the difference between it and the grand jury subpoena, on page 737, as follows:

“The power granted to the Commissioner of Internal Revenue by 26 U. S. C. A., Section 3614 is inquisitorial in character and has been compared to the power vested in federal grand juries. *Bolich v. Rubel*, 2d Cir., 67 F. 2d 894, 895; *Brownson v. United States*, 8 Cir., 32 F. 2d 844, 848. An important difference, however, is that, while the reports of grand juries are made to the court, the results of tax investigations are reported to the Commissioner and it is for him to determine what action, if any, is required under the law in view of the facts revealed.”

When a matter is under investigation by Treasury agents and no recommendation has yet been made to the Department of Justice or other proper agency as to criminal prosecution, the investigation is primarily an administrative tax investigation. The agents are attempting to determine taxpayer's correct tax liability. One of the basic and necessary tools given to the Treasury investigators by Congress is the authority to summon witnesses and documents. If, in the course of the investigation or at the completion thereof, the facts and the evidence indicate to the agents that a crime has been committed, they are then under a duty to recommend criminal prosecution and recommend to the Commissioner that the case be forwarded to the Department of Justice. The possibility that criminal violations may be encountered is present in every investigation and to contend that the summons should not be employed to obtain evidence which may later be used in a criminal case is to make the summons a worthless tool.

Most of the cases upholding the validity of an administrative summons under the Internal Revenue Code have involved summonses issued by special agents rather than by revenue agents or collection officers. Since the primary duty of a special agent is to investigate tax evasion and fraud [R. 11], the courts must have contemplated that any evidence uncovered in response to the summonses might very possibly be introduced at a later criminal trial, should one be instituted on tax evasion charges. All the following cases have involved summonses issued by special agents:

Chapman v. Goodman, 219 F. 2d 802 (9th Cir., 1955);

Peoples Deposit Bank v. United States, 112 Fed. Supp. 720 (E. D. Ky., 1953), *affd.* 212 F. 2d 86, *cert. denied*, 348 U. S. 838;

Falsone v. United States, *supra*;

Tucker v. Hubner, 129 Fed. Supp. 110 (S. D. Cal., 1955), appeal docketed No. 14704 (9th Cir.), Feb. 24, 1955 and argued and submitted Nov. 7, 1955;

Gretsky v. Basso, 136 Fed. Supp. 640 (D. C. Mass., 1955);

Schulman v. Dunlap, 105 Fed. Supp. 104 (S. D. N. Y., 1952);

In re Wood, 130 Fed. Supp. 121 (W. D. Ky., 1955).

Conclusion.

The judgment of the District Court committing Delta and Clifford Boren, the responsible officers of the Clifford O. Boren Contracting Co., Inc., to the custody of the United States Marshal until they shall obey the order of the Court compelling them to produce for examination, copying and photostating the summoned corporate books, records, and payroll checks, and fining the corporation a compensatory fine of \$110.00, should be affirmed.

Respectfully submitted,

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July, 1956.



APPENDIX.

Internal Revenue Code of 1954.

SECTION 6501.

Sec. 6501. LIMITATIONS ON ASSESSMENT AND COLLECTION.

(a) GENERAL RULE.—Except as otherwise provided in this section, the amount of any tax imposed by this title shall be assessed within 3 years after the return was filed (whether or not such return was filed on or after the date prescribed) or, if the tax is payable by stamp, within 3 years after such tax became due, and no proceeding in court without assessment for the collection of such tax shall be begun after the expiration of such period.

* * * * *

(c) EXCEPTIONS.—

(1) FALSE RETURN.—In the case of a false or fraudulent return with the intent to evade tax, the tax may be assessed, or a proceeding in court for collection of such tax may be begun without assessment, at any time.

(2) WILLFUL ATTEMPT TO EVADE TAX.—In case of a willful attempt in any manner to defeat or evade tax imposed by this title (other than tax imposed by subtitle A or B), the tax may be assessed, or a proceeding in court for the collection of such tax may be begun without assessment, at any time.

(68A Stat. 803)

* * * * *

(4) EXTENSION BY AGREEMENT.—Where, before the expiration of the time prescribed in this section for the assessment of any tax imposed by this title, except the estate tax provided in chapter 11, both the Secretary or his delegate and the taxpayer have consented in writing to its assessment after such time, the tax may be assessed at any time prior to the expiration of the period agreed upon. The period so agreed upon may be extended by subsequent agreements in writing made before the expiration of the period previously agreed upon.

(68A Stat. 804)

SECTION 6653.

Sec. 6653. FAILURE TO PAY TAX.

(b) FRAUD.—If any part of any underpayment (as defined in subsection (c)) of tax required to be shown on a return is due to fraud, there shall be added to the tax an amount equal to 50 percent of the underpayment. In the case of income taxes and gift taxes, this amount shall be in lieu of any amount determined under subsection (a).

(68A Stat. 822)

SECTION 7402.

Sec. 7402. JURISDICTION OF DISTRICT COURTS.

(a) TO ISSUE ORDERS, PROCESSES, AND JUDGMENTS.—The district courts of the United States at the instance of the United States shall have such jurisdiction to make and issue in civil actions, writs and orders of injunction, and of *ne exeat republica*, orders appointing receivers, and such other orders and processes, and to render such judgments and

decrees as may be necessary or appropriate for the enforcement of the internal revenue laws. The remedies hereby provided are in addition to and not exclusive of any and all other remedies of the United States in such courts or otherwise to enforce such laws.

(b) TO ENFORCE SUMMONS.—If any person is summoned under the internal revenue laws to appear, to testify, or to produce books, papers, or other data, the district court of the United States for the district in which such person resides or may be found shall have jurisdiction by appropriate process to compel such attendance, testimony, or production of books, papers, or other data.

(68A Stat. 873)

SECTION 7602.

SEC. 7602. EXAMINATION OF BOOKS AND WITNESSES.

For the purpose of ascertaining the correctness of any return, making a return where none has been made, determining the liability of any person for any internal revenue tax or the liability at law or in equity of any transferee or fiduciary of any person in respect of any internal revenue tax, or collecting any such liability, the Secretary or his delegate is authorized—

(1) To examine any books, papers, records, or other data which may be relevant or material to such inquiry;

(2) To summon the person liable for tax or required to perform the act, or any officer or employee of such person, or any person having possession, custody or care of books of account

containing entries relating to the business of the person liable for tax or required to perform the act, or any other person the Secretary or his delegate may deem proper, to appear before the Secretary or his delegate at a time and place named in the summons and to produce such books, papers, records, or other data, and to give such testimony, under oath, as may be relevant or material to such inquiry; and

(3) To take such testimony of the person concerned, under oath, as may be relevant or material to such inquiry.

(68 Stat. 901)

SECTION 7603.

Sec. 7603. SERVICE OF SUMMONS.

* * * When the summons requires the production of books, papers, records, or other data, it shall be sufficient if such books, papers, records, or other data are described with reasonable certainty.

(68A Stat. 902)

SECTION 7604.

Sec. 7604. ENFORCEMENT OF SUMMONS.

(a) JURISDICTION OF DISTRICT COURT.—If any person is summoned under the internal revenue laws to appear, to testify, or to produce books, papers, records, or other data, the United States district court for the district in which such person resides or is found shall have jurisdiction by appropriate process to compel such attendance, testimony, or production of books, papers, records, or other data.

(b) ENFORCEMENT.—Whenever any person summoned under section 7602 neglects or refuses to obey such summons, or to produce books, papers, records, or other data, or to give testimony, as required, the Secretary or his delegate may apply to the judge of the district court or to a United States commissioner for the district within which the person so summoned resides or is found for an attachment against him as for a contempt. It shall be the duty of the judge or commissioner to hear the application, and, if satisfactory proof is made, to issue an attachment, directed to some proper officer, for the arrest of such person, and upon his being brought before him to proceed to a hearing of the case; and upon such hearing the judge or the United States commissioner shall have power to make such order as he shall deem proper, not inconsistent with the law for the punishment of contempts, to enforce obedience to the requirements of the summons and to punish such person for his default or disobedience.

(68A Stat. 902)

SECTION 7605(b).

Sec. 7605. TIME AND PLACE OF EXAMINATION.

* * * * *

(b) RESTRICTIONS ON EXAMINATION OF TAXPAYER.—No taxpayer shall be subjected to unnecessary examination or investigations, and only one inspection of a taxpayer's books of account shall be made for each taxable year unless the taxpayer requests otherwise or unless the Secretary or his delegate, after investigation, notifies the taxpayer in writing that an additional inspection is necessary.

(68A Stat. 902)



No. 15010

United States Court of Appeals

FOR THE NINTH CIRCUIT

CLIFFORD O. BOREN CONTRACTING CO., INC.,
a California corporation; CLIFFORD O. BOREN,
President, CLIFFORD O. BOREN CONTRACTING
CO., INC.; and DELTA M. BOREN, Vice-President,
CLIFFORD O. BOREN CONTRACTING CO., INC.,

Appellants,

vs.

LLOYD M. TUCKER, Special Agent, Internal
Revenue Service,

Appellee.

On Appeal from the United States
District Court for the Southern
District of California,
Southern Division

REPLY BRIEF FOR THE APPELLANTS

FILED

JUL 2 - 1956

PAUL P. O'BRIEN, CLERK

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STATUTES

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No. 15010

IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CLIFFORD O. BOREN CONTRACTING CO., INC.,
a California corporation; CLIFFORD O. BOREN,
President, CLIFFORD O. BOREN CONTRACTING
CO., INC.; and DELTA M. BOREN, Vice-President,
CLIFFORD O. BOREN CONTRACTING CO., INC.,

Appellants,

vs.

LLOYD M. TUCKER, Special Agent, Internal
Revenue Service,

Appellee.

On Appeal from the United States
District Court for the Southern
District of California,
Southern Division

REPLY BRIEF FOR THE APPELLANTS

STATEMENT

The Appellants have confined their statements and arguments to matters which appear in the record on appeal. Appellee has not seen fit to stay within the record on appeal. We therefore feel compelled to comment upon Appellee's excursions from the record.

Appellee has referred to an indictment returned by the Federal Grand Jury on April 25, 1956, in *United States v. Del L. Brandow, Charles D. Ford, et al.*, Southern District of California, No. 24955-CD. [Br. 4] Appellants therefore believe it necessary to place before this Court a complete copy of the indictment, which is printed in the Appendix, *infra*, and to call this Court's attention to the allegations contained in Appellants' second separate defense, paragraphs II, III, IV, V and VI, [R. 20-21], and to Count One through Seven of said indictment.

Appellee has stated that he was informed that endorsements on certain payroll checks of Appellant corporation "were forged" (Br. 5-6), and that he "found evidence that payroll checks of the corporation were being issued, endorsements being forged, checks cashed, and the proceeds going not to the payee but to the taxpayers . . . " [Br. 9-10] The evidence in the record on these statements is Appellee's affidavit. [R. 34] An examination of said affidavit will show no evidence of forgery, cashing of checks, or receipt by the taxpayers of

the proceeds. These are rank speculations by Appellee.

Appellee states that he was assigned to the investigation during the course of Ford's investigation, "but did not actually get involved in the investigation" until after Ford resigned, the report of Ford's solicitations had been made, and a new agent assigned to the case. The evidence is that Appellee was assigned at the request of Ford on May 11, 1954, almost five months before the taxpayers reported Ford's activities; and that Appellee did not commence his *examination* of the returns of Appellants Clifford O. Boren and Delta M. Boren until October 20, 1954. [R. 116-117] There is no evidence that Appellee was not "involved in the investigation" in ways other than examining the Appellants' returns between May 11, 1954 and October 6, 1954, the date the activities of Ford were reported.

Appellee states that "Delta and Clifford Boren are the owners" of the Boren Company. [Br. 14] The record is that they are the vice president and president, respectively, of Appellant corporation. [R. 49] The ownership of the Appellant corporation is not shown by the record.

Appellee states that "... he has not completed his report or made any recommendation to his superiors..." [Br. 26] The record is devoid of any evidence relative to this statement.

Appellee states that "By refusing to rely on the preliminary work of the 'suspect' former Agent, Ford, the Government leaned over backwards not

to prejudice the taxpayers.” [Br. 12-13] The record does not show that the Government refused to rely on the work of Ford. On the contrary, there are strong indications that Appellee has in fact relied upon Ford’s work throughout the investigation. This will be discussed further in Part I of this brief.

The indictment, evidence of forgery, cashing checks and receiving the proceeds thereof, the lack of involvement of Appellee in the investigation during a period of almost five months after he was assigned to the case, the ownership of the Boren Company, the absence of a report or recommendation by Appellee, the Government’s refusal to rely upon Ford’s work, the Government — personified by Appellee and Revenue Agent Calkins — “leaning over backwards not to prejudice the taxpayers”, — all matters *de hors* the record — are temptations for Appellants likewise to go outside the record for the purpose of demonstrating the truth or falsity of the statements, further background of the examination, and possible motives of Appellee and Revenue Agent Calkins. However, we do not believe this Court is interested in making factual determinations to supplement the record on appeal by briefs unsupported by sworn testimony. If the Court believes any of these matters to be material to the determination of the issues involved, further proceedings should be had.

For convenience in discussing Appellee’s arguments, we will follow Appellee’s organization.

ARGUMENT

I

THE DISTRICT COURT ERRED IN FINDING APPELLANTS IN CIVIL CONTEMPT.

A. Whether the examination of the individual taxpayers has terminated is not determinative. The determinative question is whether Appellee has made one examination of Appellant corporation's books of account.

The burden of the argument of Appellee that the examination of the income tax liability of Appellants Clifford O. Boren and Delta M. Boren which commenced November 2, 1953 never terminated and is still continuing, is that the examination by Appellee and Revenue Agent Calkins is not a re-examination, but a "fresh start" precipitated by the taxpayers' accusations against former Revenue Agent Ford. [Br. 11-13] Appellee reasons that since the "fresh start" shows a continuing examination of the individual taxpayers, there is no re-examination of the corporate taxpayer. This evidences a misconception of the issues here involved.

Appellants have not in this proceeding contended that the examination commenced by Appellee and Revenue Agent Calkins on October 20, 1954 was a proscribed re-examination of the Appellant corporation's books and records. Rather their contention is that the examination sought by the summonses is a re-examination sought by Appellee,

after Appellee and Revenue Agent Calkins had made a complete and detailed examination of Appellant corporation's books and records in connection with the tax liability of Appellants Delta M. Boren and Clifford O. Boren for the years 1950 and 1951 between the period October 20, 1954 and July 15, 1955. The primary issue is whether he is entitled to make a re-examination under the circumstances.

Appellee states that after the issuance of notices of deficiency to the individual Appellants he was first informed that one of the persons carried as an employee of Appellant corporation was not a bona fide employee. [Br. 12] This does not comport with the facts.

The Appellants brought out at the hearing the fact that the affidavit of said employee was dated March 16, 1955. Appellee was in doubt as to the date of the affidavit. [R. 132, 140] However, Appellee testified that the notices of deficiency issued under date of March 11, 1955 to Appellants Clifford O. Boren and Delta M. Boren for the years 1950 and 1951 contained adjustments based on information obtained from the examination of Appellant corporation's payroll records and checks, and since the issuance of the notices of deficiency, Appellee testified, he had not obtained any other information showing that any other particular payroll checks or deductions should be disallowed for the year 1951. [R. 128]

The conclusion necessarily follows that the information which was contained in the affidavit dated March 16, 1955 was obtained prior to that date, and prior to the issuance of the notices of deficiency.

However, the precise date Appellee obtained his information is not of great consequence. If it is assumed that the information was not obtained until March 16, 1955 the results would not be affected. The Court found as a fact that Appellee did not want to examine the books and records for the purpose of adjusting or changing the notice of deficiency. [R. 58] Furthermore, between March 16, 1955 and July 15, 1955, Appellee had adequate opportunity to examine the books and records sought by the summonses. [R. 120-121] It must also be recalled that Appellee had available for examination, and did examine, the books and records sought, including *all* the payroll checks, and extensive notes and transcripts were made from the books and records. [R. 52] Appellee abstracted from the payroll checks all information contained thereon. [R. 136-137]

Appellee argues that he sought to have the checks photographically reproduced “ . . . to determine whether then to impose additional civil fraud sanctions . . . ” [Br. 12]

Appellee testified that adjustments had been made in the notices of deficiency on the basis of information obtained by him in his examinations, that since the issuance of the notices of deficiency no additional information in derogation to the pay-

roll deductions or checks had been obtained. [R. 128] Furthermore, the full measure of civil fraud sanctions had been imposed against Appellants Clifford O. Boren and Delta M. Boren in the notices of deficiency. [R. 56] In addition, the Court found that Appellee had acknowledged that he did not want to examine the records and checks for the purpose of adjusting or changing the notices of deficiency. [R. 57-58]

Appellee asserts in his brief that "By refusing to rely on the preliminary work of the 'suspect' former agent, Ford, the Government leaned over backwards not to prejudice the taxpayers." [Br. 12-13] This deserves examination.

At the request of the now indicted Ford, Appellee was assigned to assist in the examination. [R. 108] Appellee states in his brief that he was primarily concerned with the investigation of alleged evasion of tax. [Br. 25] This assignment was made on May 11, 1954, almost five months prior to the report by one of the Appellants of Ford's solicitations. Appellee testified that he did not commence his examination until October 20, 1954. [R. 11] On that date, and without previously investigating, Appellee informed counsel for Appellants that he intended to conduct a criminal investigation of the returns of Appellants Clifford O. Boren and Delta M. Boren for the years 1950 and 1951. Appellee's associate, Revenue Agent Calkins, had not, prior to October 20, 1954, investigated these

returns. [R. 117] Appellee testified that on October 20, 1954 he had memoranda which had been prepared by Revenue Agent Ford [R. 118], and had seen memoranda prepared by Revenue Agent Miller, who was associated with Revenue Agent Ford in the examination of Appellants' returns. [R. 118-119]

From the foregoing it is probable the government has in fact relied on the "preliminary work of the 'suspect' former agent, Ford . . ."

The information relative to the employee did not come into Appellee's knowledge until sometime after February, 1955. [R. 140] Appellee asserts in his affidavit [R. 12] that "Preliminary investigation of the taxable years 1950 and 1951 of the Borens shows that in excess of \$40,000.00 of taxable income was not reported . . ." This affidavit was subscribed on September 19, 1955. The information relative to the employee which Appellee states he obtained relates only to \$2,817.97 of salary deducted by Appellant corporation, and \$2,853.03 by Appellant Clifford O. Boren. No evidence of any kind was introduced by Appellee concerning the difference between the salary amounts and the \$40,000.00. It is not known whether the "\$40,000.00" includes, or is in addition to the salary items. Since Appellee commenced his examination with the avowed purpose of conducting a criminal investigation, with no prior investigation by him or his associate Revenue Agent Calkins, it is a reasonable inference that

the "\$40,000.00" was the basis for his criminal investigation and was a product of the efforts of Ford and his associate Miller.

The Court's attention is called to Count Five of the indictment in the Appendix, wherein is alleged a conspiracy involving Charles D. Ford which resulted in the assertion by one of the conspirators, another revenue agent, that a taxpayer had a deficiency of approximately \$146,000.00, and the examination was not yet completed. It is further alleged therein that this asserted deficiency was false.

B. The evidence does not support the findings that the records sought by the summonses are material, relevant and necessary to Appellee's investigation.

This subject was fully discussed in Appellants' brief, pages 28 to 33, and will not be reiterated.

It is to be noted, however, that Appellee discusses only the materiality of the payroll checks. He has apparently abandoned his assertion that the other records sought by the summonses are material to his investigation.

Appellee premises an argument on the statement that the individual Appellants "are the owners" of Appellant corporation. This is not supported by the record.

C. The District Court did not exercise its independent judgement as to what documents and entries were relevant.

The books and records sought by the summonses were, at the request of the Court, brought before the Court by the Appellants. They were available to the Court for its examination to determine whether the records called for contained an item or items having a real bearing on the matter under investigation. The testimony of Appellee and Revenue Agent Calkins shed very little light upon what matters the records contained which had a bearing on the tax liability of Appellants Clifford O. Boren and Delta M. Boren. [R. 138, 143-145]

Furthermore, it must be remembered that Appellee and Revenue Agent Calkins had previously made a thorough examination of the records and had extensive notes and transcripts therefrom.

D. Appellants have stated legally sufficient reasons for declining to produce the records demanded.

Appellee argues that Appellants never stated any legally sufficient reason for declining to produce the summoned records. The lower Court held that the answer, and the third through eighth separate defenses, were legally sufficient defenses. [R. 75-76]

The defenses to the petition were considered at length in Appellants' opening brief. However, a comment on the fourth defense is pertinent.

Appellants alleged that throughout the course of the examination being made by Appellee and Revenue Agent Calkins the books and records

sought by Appellee in his summonses were available to him. Appellants also alleged that Appellee spent less than 5% of his time actually examining the books and records, and more than 95% of his time was devoted to leisurely relaxing and enjoying the comforts afforded by the offices of counsel for Appellants. [R. 26]

The lower Court found as a fact that Appellee and Revenue Agent Calkins had available for examination, and did examine all the records sought herein, and extensive notes and transcripts thereof were made. [R. 51-52] Appellee testified that he devoted only a "small amount" of his available time to the examination of these books and records. [R. 121]

This defense, which the lower Court had found to be legally sufficient, was disposed by a finding that Appellee had never been given "exclusive possession or control" of said records, that he was permitted to examine the records only in the presence of counsel for Appellant corporation, and was denied permission to photographically reproduce the records. [R. 57]

Appellee's failure to utilize the opportunities which he had to further examine the books and records is a defense to Appellee's action. Appellee is authorized to make only reasonable and necessary examinations. Through the present action Appellee seeks to re-examine Appellant's books and records after a thorough, complete and detailed examination

had been made. Appellee testified in response to a question by the Court that he had full opportunity to make a complete examination of the checks. [R. 120] Since the examination was made, no additional information was obtained by Appellee. If he now believes it necessary to re-examine Appellants' books and records, this necessity must be ascribed to a failure on his part to sufficiently utilize his prior opportunities. It is unreasonable to require a taxpayer to be subjected to a re-examination, especially one as broad in scope as required by the summonses, simply because Appellee failed to take advantage of his opportunities.

The authority to examine books and records does not require a taxpayer to give the examining agent "exclusive possession or control." A taxpayer is entitled to be present in person or by counsel of his choice at an examination conducted under the authority of a summons issued under Section 7602, IRC 1954. He is no less entitled to be present in person or by counsel at an examination conducted under said section without the issuance of a summons.

The facts which brought about the indictments set forth in the Appendix, and that fact that Appellee was assigned to the investigation at the request of Ford approximately five months prior to the report of the solicitations, were ample, cogent reasons for the presence of counsel throughout the examination.

II

THE DISTRICT COURT ERRED IN ORDERING APPELLANTS TO PRODUCE CERTAIN RECORDS FOR PHOTOGRAPHING BY APPELLEE.

The burden of Appellee's argument that he is entitled to demand that the books and records of Appellant corporation be photographically reproduced is that if revenue agents were not allowed to record for their use the information appearing on the books and documents, the authority conferred by Section 7602 would be hollow and meaningless.

The obvious answer to this argument is that Appellee and Revenue Agent Calkins *have* recorded for their use the information contained in the books and records sought. The District Court found as a fact that Revenue Agent Calkins made extensive notes and transcripts from the books and records sought, and from the payroll checks and records. The District Court also found as a fact that Appellee made abstracts of information from the payroll records and checks. [R. 52] The testimony of Appellee shows that his examination of the payroll checks was most complete. [R. 136-137]

Appellee argues that the present case does not in any way involve an illegal search and seizure in violation of the Fourth Amendment, but involves the production by legal process of the records of a third party. [Br. 24]

We have demonstrated that the examination sought by the summonses is unnecessary, unreasonable in scope, in excess of the authority conferred by section 7602, IRC 1954, for a purpose not within the statute, and does not comply with the requirements of Section 7605(b), IRC 1954.

As this Court recently pointed out “ . . . such proceeding is in the nature of a search and seizure which has constitutional overtones, *especially when directed to a third person*, . . . Such a demand, to be constitutional, must constitute a reasonable exercise of the power granted. A third party is within his rights to refuse such a demand and test the matter in Court.” [Emphasis supplied]

Local 174, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, et al, v. U.S., F. 2d, CCA-9, No. 14,746

The case of *Westside Ford v. United States*, 206 F.2d 627, (CCA-9) cited by Appellee, [Br. 23-24] related to a grant of authority to the President as a part of his emergency powers, which authorized inspections far greater in scope than Section 7602, IRC 1954. This authority granted under the Defense Production Act of 1950 provided that the “President shall be entitled . . . by regulation, subpoena or *otherwise* to obtain such information from . . . make *such inspection* of the books, records, and other writings, premises or property of . . . any

other writings, premises or property of . . . any person as may be appropriate, in his discretion . . . ” 50 U.S.C.A. Appendix, Section 2155(a). The authority thus conferred left in the President’s discretion the means of investigation as well as the subjects of investigation. The authority granted in Section 7602, IRC 1954, to “examine” does not confer such discretion on Appellee.

Furthermore, the *Westside Ford* case involved records required to be kept as an aid to the enforcement of a regulatory statute and under the doctrine of *Shapiro v. United States*, 335 U.S. 1, would be public records, which is not true in this case.

III

WHERE THE ADMITTED PURPOSE OF THE EXAMINATION IS TO SECURE EVIDENCE FOR CRIMINAL PROSECUTION, IT IS OUTSIDE THE AUTHORITY CONFERRED BY SECTION 7602, IRC 1954.

Appellee's argument is that in any examination there is a possibility of unearthing a criminal violation and this possibility should not negate or restrict the agent's authority. This is obviously true. However, here we are not dealing with such a general possibility.

Appellee has testified that one of his express purposes in issuing the summonses was to assist in the preparation of a criminal case. [R. 134] Realistically viewed, the background of the examination and the evidence, permits the reasonable inference that Appellee's sole purpose is to assist in the preparation of a criminal case.

In *United States v. O'Connor*, 118 Fed. Supp. 248, (D.C. Mass., 1953) discussed by Appellee in his brief, page 26, the facts showed that *one* of the purposes for issuing the summons was to aid in a criminal prosecution. In that case the government argued, page 250, that ". . . so far as this Court knows there may be many other purposes more obviously appropriate to the direct interest of the Treasury and the direct concern of [the Special Agent]." The Court refused to enforce the summons.

It is again to be noted that although Appellee

asserts that “. . . he has not completed his report or made any recommendation to his superiors. . . ” [Br. 26] there is no support for this statement in the record.

CONCLUSION

The Judgement and Order of the District Court should be reversed.

Respectfully submitted,

JOHN A. BRANT
Attorney for Appellants

July, 1956.

APPENDIX

IN THE UNITED STATES DISTRICT COURT
IN AND FOR THE SOUTHERN DISTRICT OF
CALIFORNIA
(CENTRAL DIVISION)

UNITED STATES OF	)	No. 24955-CD
AMERICA,	)	INDICTMENT
Plantiff,	)	(U.S.C., Title 18, Sec.
v.	)	371-Conspiracy; U.S.
	)	C., Title 18, Sec. 1001-
	)	False statements; U.
DEL L. BRANDOW,	)	S.C., Title 26, 1954
CHARLES D. FORD,	)	Ed., Sec. 7214(a) (5)
WILLIAM C. RAU, and	)	and U.S.C., Title 26,
WILLIAM E. WALLACE,	)	1954 Ed., Sec. 7214
Defendants.	)	(a) (6) - Defrauding
	)	the United States)

The grand jury charges:

COUNT ONE

[18 U.S.C., Section 371]

That on or about the 8th day of September, 1954, and continuously thereafter up to and including the 6th day of October, 1954, in the Southern District of California, WILLIAM C. RAU, late of Los Angeles, California; DEL L. BRANDOW, late of La Canada, California; and CHARLES D. FORD, late of San Diego, California, and sometimes hereinafter called the defendants, did unlawfully, knowingly and willfully conspire, combine, federate and agree together and with each other to defraud the United States of its right to have the lawful function of its Internal Revenue Service exercised and

performed freely from unlawful impairment and obstruction and free from corruption, improper influence, dishonesty and fraud, and free from unauthorized disclosure of its confidential information, information obtained through the efforts of its employees and the results of its investigations; and that during the existence of said conspiracy one or more of the accused, as hereinafter mentioned by name, did the following acts in furtherance of and to effect the object of the conspiracy as aforesaid:

1. That on or about the 8th day of September, 1954, CHARLES D. FORD, then a revenue agent in the employ of the Internal Revenue Service, stated in a telephone conversation with Mrs. Delta M. Boren that he was a revenue agent working on her tax case and that he was shortly leaving the Government and that her representatives were not properly handling her case and that he, Ford, could be very helpful to her.

2. That on or about the 14th day of September, 1954, CHARLES D. FORD conferred with Delta M. Boren at her home in San Diego, California, and stated to her that her attorneys were not properly handling her case and that she would be much better off to employ him, Ford, and his associate, WILLIAM C. RAU, an attorney.

3. That on or about the 15th day of September, 1954, CHARLES D. FORD and DEL L. BRANDOW conferred with Delta M. Boren at her home in San Diego, California, and stated that her attorneys

were not handling her case properly; that they, the defendants, could save her a lot of money and keep her out of jail because of their knowledge of the Government's case if she would employ them.

4. That on or about the 28th day of September, 1954, CHARLES D. FORD, DEL L. BRANDOW, and WILLIAM C. RAU conferred with Delta M. Boren at her home in San Diego, California, and stated to Mrs. Boren that her attorneys were not properly handling her case and that they, the defendants, could save her a substantial amount of money because of their knowledge of the Government's case, if retained.

COUNT TWO

[U.S.C., Title 18, Sec. 1001]

That on or about the 26th day of October, 1954, DEL L. BRANDOW, late of La Canada, California, did willfully and knowingly make and cause to be made false and fraudulent statements and representations in a matter within the jurisdiction of a department and agency of the United States by signing an affidavit before Special Agent Francis S. Sullivan and Special Agent Walter Schlick, both of the Internal Revenue Service, Treasury Department of the United States, at Los Angeles, California, in the Southern District of California, which affidavit stated that at no time during the discussions at Mrs. Boren's house did Mr. Ford or anyone else state directly or imply that Mr. Ford was

willing to disclose the Government's case and further stated that Charles D. Ford at no time discussed the tax features of the Boren case with him, whereas, as he then and there well knew, he (Del L. Brandow) did state and imply during the conversations at Mrs. Boren's house on September 15 and September 28, 1954, that Ford had disclosed the Government's case to him and that Ford was willing to disclose it for Mrs. Boren's benefit.

COUNT THREE

[U.S.C., Title 18, Sec. 1001]

That on or about the 26th day of October, 1954, WILLIAM C. RAU, late of Los Angeles, California, did willfully and knowingly make and cause to be made, false and fraudulent statements and representations in a matter within the jurisdiction of a department and agency of the United States by signing an affidavit before Special Agent Francis S. Sullivan and Special Agent Walter Schlick, both of the Internal Revenue Service, Treasury Department of the United States, at Los Angeles, California, in the Southern District of California, which affidavit stated that at no time during the discussions at Mrs. Boren's house did Mr. Ford or anyone else state directly or imply that Mr. Ford was willing to disclose the Government's case and further stated that Charles D. Ford at no time discussed the tax features of the Boren case with him, whereas, as he then and there well knew, he (William C.

Rau) did state and imply during the conversations at Mrs. Boren's house on September 28, 1954, that Ford had disclosed the Government's case to him and that Ford was willing to disclose it for Mrs. Boren's benefit.

COUNT FOUR

[U.S.C., Title 18, Sec. 1001]

That on or about the 26th day of October, 1954, CHARLES D. FORD, late of San Diego, California, did willfully and knowingly make and cause to be made, false and fraudulent statements and representations in a matter within the jurisdiction of a department or agency of the United States by appearing before Special Agents Francis S. Sullivan and Walter Schlick, at the office of the Intelligence Division, Internal Revenue Service, Los Angeles, California, at Los Angeles, in the Southern District of California, and stated under oath that he had never discussed the Boren case with DEL L. BRANDOW or WILLIAM C. RAU, that he had never solicited employment from Delta M. Boren regarding her tax problems, and that he did not on or about September 8, 1954 call at the home of Delta M. Boren, whereas, as he then and there well knew, he had discussed the Boren case with DEL L. BRANDOW and WILLIAM C. RAU, he had solicited employment from Delta M. Boren, and had on or about September 8, 1954 called at the home of Delta M. Boren.

COUNT FIVE

[18 U.S.C. 371, 26 U.S.C. 7201, 1954 Ed.]

That on or about the 3rd day of September, 1954, the exact date being to the grand jurors unknown, and continuously thereafter up to and including the 26th day of November, 1954, in the Southern District of California, WILLIAM C. RAU, late of Los Angeles, California; DEL L. BRANDOW, late of La Canada, California; CHARLES D. FORD, late of San Diego, California; and WILLIAM E. WALLACE, late of Glendale, California, and sometimes hereinafter called the defendants, did unlawfully, knowingly, and willfully conspire, combine, federate, and agree together and with each other to defraud the United States of its right to have the lawful function of its Internal Revenue Service exercised and performed freely from unlawful impairment and obstruction and free from corruption, improper influence, dishonesty and fraud, and to attempt to evade and defeat a large part of the income taxes due and owing to the United States of America by Howard W. and Edith A. Kirch, for the calendar years 1950, 1951, 1952 and 1953, and that during the existence of said conspiracy one or more of the accused, as hereinafter mentioned by name, did the following acts in the furtherance of and to effect the object of the conspiracy as aforesaid:

1. That on or about the 3rd day of September, 1954, WILLIAM E. WALLACE, in the city of Vista,

county of San Diego, did present himself and identify himself as a revenue agent with the Internal Revenue Service, United States Treasury Department, to one Howard W. Kirch, and stated to said Howard W. Kirch that he, Wallace, was assigned to investigate said Kirch's income tax returns for the years 1952 and 1953.

2. That subsequent to the 3rd day of September, 1954, and extending to approximately the 14th day of September, 1954, WILLIAM E. WALLACE did examine books and records of Howard W. Kirch, and in the course of said examination said WILLIAM E. WALLACE stated to Howard W. Kirch that he, Wallace, had uncovered a deficiency of approximately \$146,000.00, and that the examination was not yet completed, when in truth and in fact said WILLIAM E. WALLACE knew that this said \$146,000.00 of deficiency was false.

3. That on or about the 14th day of September, 1954, DEL L. BRANDOW and WILLIAM C. RAU met with Howard W. Kirch in the offices of WILLIAM C. RAU, in Los Angeles, California, and said WILLIAM C. RAU stated to said Howard W. Kirch that he (Kirch) was in serious tax trouble, and that he, WILLIAM C. RAU, DEL L. BRANDOW and CHARLES D. FORD would represent him before the Internal Revenue Service, and that their fee would be 25% of the amount saved for Kirch.

4. That on or about the 15th day of September, 1954, DEL L. BRANDOW and CHARLES D. FORD

met with Howard W. Kirch and Edith A. Kirch, in Vista, California, at which meeting Howard W. Kirch and Edith A. Kirch signed an agreement with WILLIAM C. RAU, under which terms said WILLIAM C. RAU would endeavor to effect a reduction or elimination of a proposed tentative deficiency assessment of Federal income taxes of approximately \$146,000.00 for a 25% contingent fee, and said Howard W. Kirch wrote out one check for \$6,000.00 and another check for \$2,000.00, both payable to the Twentieth Century Auditors and delivered them to DEL L. BRANDOW, doing business as Twentieth Century Auditors.

5. That on or about the 26th day of October, 1954, DEL L. BRANDOW, WILLIAM C. RAU and CHARLES D. FORD informed Howard W. Kirch that Revenue Agent WILLIAM E. WALLACE would not close Kirch's tax case and make an agreement until they (Rau, Brandow and Ford) received their fee.

6. That on or about the 29th day of October, 1954, Howard W. Kirch, WILLIAM C. RAU, CHARLES D. FORD, DEL L. BRANDOW, and WILLIAM E. WALLACE met in the offices of WILLIAM C. RAU, in Los Angeles, California, and said WILLIAM E. WALLACE delivered Treasury Department Form 870, Waiver of Restrictions on Assessment and Collection of Deficiency in Tax and Acceptance of Overassessment, to Howard W. Kirch, in which the Treasury Department, through

WILLIAM E. WALLACE, assessed income taxes of \$13,284.58 plus penalties of \$1,338.51 upon Howard W. and Edith A. Kirch for the taxable years 1950, 1951, 1952, and 1953, and that Howard W. Kirsch, in the presence of WILLIAM E. WALLACE, presented to CHARLES D. FORD, DEL L. BRANDOW and WILLIAM C. RAU a check in the amount of \$24,000.00.

7. That on or about the 26th day of November, 1954, WILLIAM E. WALLACE turned in a report of the tax liability of Howard W. and Edith A. Kirch for the years 1950 and 1953, inclusive, to the Audit Division of the Office of the Director of Internal Revenue, Los Angeles, California, and included with this report a Treasury Department Form 870 with assessed taxes in the amount of \$13,284.58 plus penalties of \$1,338.51, and that said WILLIAM E. WALLACE recommended that the tax liability of Howard W. and Edith A. Kirch for the years 1950 to 1953, inclusive, be settled for this amount.

COUNT SIX

[26 U.S.C., Sec. 7214(a) (5), 1954 Ed.]

That on or about the 3rd day of September, 1954, the exact date being to the grand jurors unknown, and continuously thereafter up to and including the 26th day of November, 1954, in the Southern District of California, WILLIAM E. WALLACE, being an officer and employee of the United States, to wit: an internal revenue agent acting in connection with a revenue law of the United States,

to wit: 26 U.S.C., Subtitle A., Chapter 1, knowingly made an opportunity for Del L. Brandow, William C. Rau, and Charles D. Ford to defraud the United States of a large part of the income taxes due and owing to the United States of America by Howard W. and Edith A. Kirch for the calendar years 1950, 1951, 1952, and 1953 by recommending an assessment of income taxes in the amount of \$13,284.58 and penalties of \$1,338.51, and by accepting a check in the amount of \$5,000.00 as partial payment of the said \$13,284.58 deficiency, which deficiency he knew to be insufficient and of a lesser amount than was actually due to the United States of America.

COUNT SEVEN

[26 U.S.C., Sec. 7214 (a) (6), 1954 Ed.]

That on or about the 3rd day of September, 1954, the exact date being to the grand jurors unknown, and continuously thereafter up to and including the 26th day of November, 1954, in the Southern District of California, WILLIAM A. WALLACE, late of Glendale, California, then an officer and employee of the United States, to wit: an internal revenue agent acting in connection with a revenue law of the United States, to wit: 26 U.S.C., Subtitle A., Chapter 1, enabled William C. Rau, Del L. Brandow, and Charles D. Ford to defraud the United States of a large part of the income taxes due and owing by Howard W. and Edith A. Kirch for the calendar years 1950, 1951, 1952, and 1953,

by recommending an assessment of income taxes in the amount of \$13,284.58 and penalties of \$1,338.51, and by accepting a check in the amount of \$5,000.00 as partial payment of this deficiency of \$13,284.58, which deficiency he then and there well knew to be insufficient, fraudulent and without basis.

A TRUE BILL

.....
Foreman

LAUGHLIN E. WATERS
United States Attorney

Bond fixed in the amount of

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.....

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BIH



United States Court of Appeals
FOR THE NINTH CIRCUIT

CLIFFORD O. BOREN CONTRACTING
CO., INC., a California corporation;
CLIFFORD O. BOREN, President
CLIFFORD O. BOREN CONTRACTING
CO., INC., and DELTA M. BOREN,
Vice-President, CLIFFORD O. BOREN
CONTRACTING CO., INC.,

Appellants,

vs.

LLOYD M. TUCKER, Special Agent,
Internal Revenue Service,

Appellee.

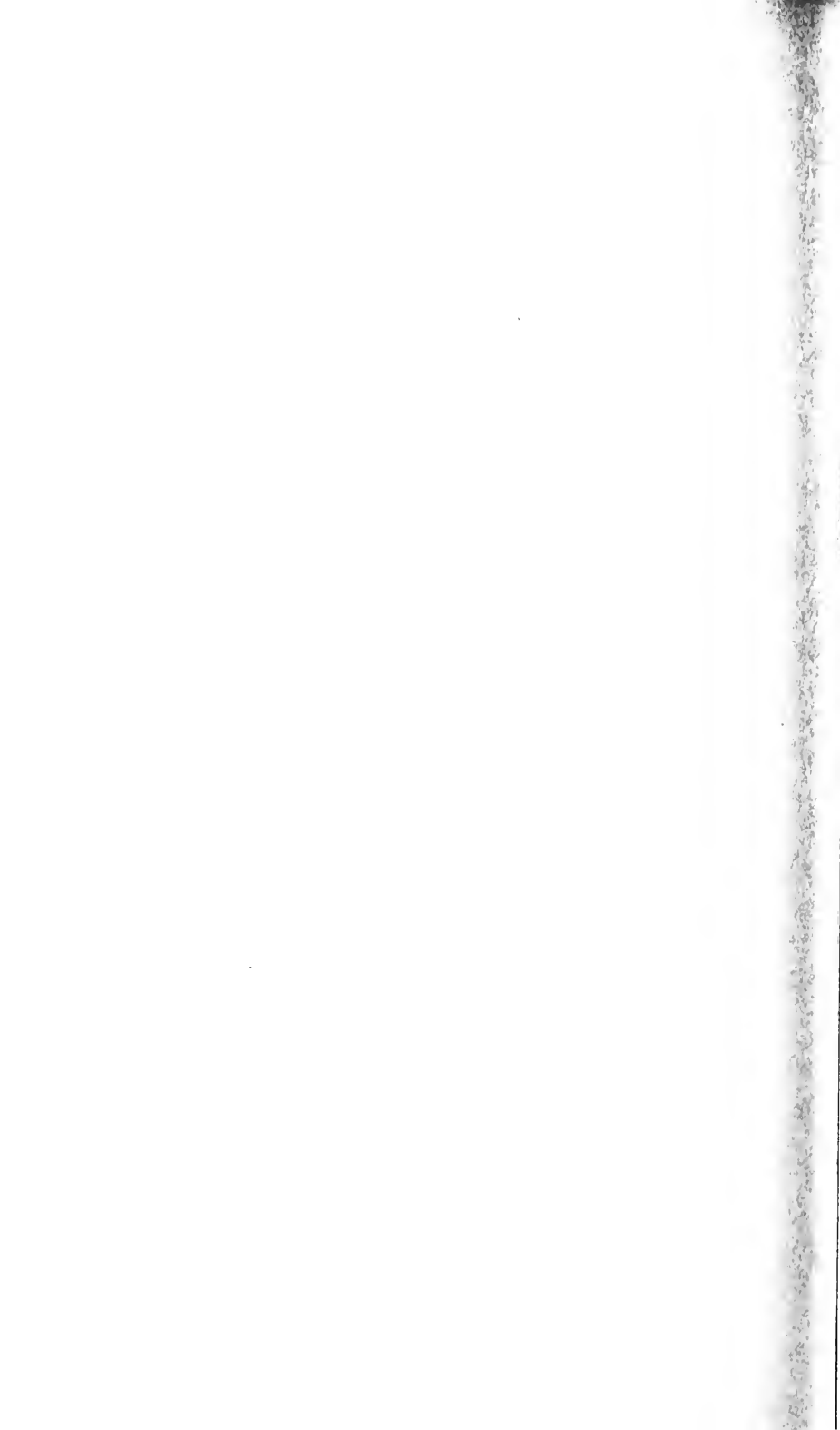
On Appeal From the United States District Court for the
Southern District of California
Southern Division

PETITION OF APPELLANTS
FOR REHEARING EN BANC

FILED

DEC 31 1956

L. P. O'BRIEN, CLERK



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No. 15010

United States Court of Appeals

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FOR REHEARING EN BANC

TO THE HONORABLE JUDGES OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT, LEMMON, BARNES, AND HAMLEY, CIRCUIT JUDGES:

Appellants, by and through their attorneys of record, hereby petition this Honorable Court to rehear the above entitled case, and upon rehearing to grant the relief prayed for.

On December 3, 1956, this Court affirmed the Order of the District Court holding Appellants in Contempt of Court. In affirming the Order holding Appellants in Contempt of Court, we respectfully submit, the Court fell into error.

The decision of this Court, it is respectfully submitted, is not in accord with the decision of this Court in *Hubner v. Tucker*,F.2d...., September 21, 1956. In the interests of uniformity of decision in this Court, it is respectfully urged that a rehearing *en banc* be granted.

GROUND FOR REHEARING

I

THE DECISION IS INCONSISTENT WITH PRIOR DECISIONS OF THIS COURT.

In *Hubner v. Tucker*,F.2d...., September 21, 1956, this Court declared the proper method to be followed by the Internal Revenue Service, and the District Court, in discovery proceedings involving third parties. [*Hubner v.*

Tucker, supra, Slip. Op. 4] The procedure there outlined was not followed in *Boren v. Tucker*, and it is respectfully urged that this Court's decision in *Boren v. Tucker* is not reconcilable with the prior holding in *Hubner v. Tucker*.

II

THE ORDER REQUIRING APPELLANTS TO SUBMIT ALL OF THE RECORDS FOR PHOTOSTATING WAS NOT SUPPORTED BY THE EVIDENCE.

This Court upheld the Order of the District Court that Appellee was entitled to photostat all of the summoned corporate books, records and payroll checks. The only evidence of the necessity of photostating the records related to the payroll checks. This Court discussed in connection with the right to photostat only the payroll checks. [Slip. Op. 6-7]

Appellants respectfully submit that this Court fell into error in not restricting the right to photostat to those records where a necessity of having exact copies was shown.

CONCLUSION

The Appellants urge this Court to reconsider its decision in light of the procedures prescribed in *Hubner v. Tucker*, and the apparent conflict of decision. The Appellants also urge this Court to reconsider the scope of the order relating to the right of Appellee to photostat the corporate records.

PRAYER

WHEREFORE, the Appellants pray that this Honorable Court grant the petition for rehearing *en banc* with reargument of the case if deemed advisable by the Court, and that it reverse the decision below.

Respectfully submitted,

John A. Brant
Attorney for Appellants

CERTIFICATION

It is hereby certified by the counsel for the Appellants in the above entitled case that this petition for rehearing is presented in good faith and in his judgment it is well founded because of the importance of the issues involved, and in no wise is it interposed for the purpose of delay.

John A. Brant
Counsel for Appellants.



